(18,865.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 235.

ANDREW J. DAVIS

vs.

HIRAM R. MILLS AND CLARENCE C. FROST.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 18, 1903.

1 United States Circuit Court of Appeals, Second Circuit.

Before Wallace, Lacombe, and Coxe, circuit judges.

ANDREW J. DAVIS, Plaintiff in Error,
vs.
HIRAM R. MILLS and CLARENCE C. FROST, Defendants in Error.

Certification of Question to the Supreme Court under the Act of March 3, 1891.

This cause came before this court at the October term of 1902 upon a writ of error sued out by the plaintiff below to review a judgment of the U. S. circuit court, district of Connecticut dismissing the complaint on the merits. As to all of the questions presented by the writ of error this court has reached a conclusion, except as to a question of law upon which it desires the instruction of the Supreme Court for its proper decision.

Statement of Facts.

The plaintiff is a citizen of Montana and the owner by assignment of three causes of action (for goods sold and on a promissory note) against the Obelisk Mining and Concentrating Company, a Montana corporation. The indebtedness of the company
2 upon these causes of action accrued July 31, 1892, July 1, 1892 and December 12, 1892 respectively. The defendants are and always have been citizens and residents of Connecticut, and at all the times mentioned in the complaint were trustees of the said Obelisk Mining Company. The statutes of Montana provide that within twenty days from the first day of September every such company shall annually file a specified report, and that if it "shall fail to do so, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." Section 460 of chapter 25 of the fifth division Compiled Statute- of Montana which was in force when the cause of action arose. Reenacted as section 451 of the Civil Code of Montana, which went into effect July 1, 1895.

The Obelisk Company failed to file certain of the required reports and the causes of action sued upon here, against the defendants as trustees to recover debts of the company, accrued September 22, 1893, or prior thereto. This action was brought to enforce the joint and several liability of the defendants under the statute on July 30, 1897.

When the cause of action accrued the Compiled Statutes of Montana contained these sections.

"SEC. 45. 1. In an action for a penalty or forfeiture, when the "action is given to an individual, or to an individual and the Ter-

"ritory, except where the statute imposing it prescribes a different "limitation; 2, an action against a sheriff or other officer for the "escape of a prisoner arrested or imprisoned on civil process shall "be commenced within one year."

3 "SEC. 50. If when the cause of action shall accrue against "a person he is out of the Territory, the action may be com- "menced within the time herein limited, after his return to the Ter- "ritory; and if after the cause of action shall have accrued he depart "from this Territory, the time of his absence shall not be a part of "the time limited for the commencement of the action."

Both of those sections were repealed by the Code of Civil Proceedure section 3482 which went into effect July 1, 1895. On the last-named date the Civil Code of Montana went into effect containing section 451 above cited. The Code of Civil Proceedure contains a separate title, numbered II and containing four chapters (sections 470 to 559), which deals exhaustively with "the time of commencing actions." It contains these sections:

"SECTION 515. Within two years:

1. An action upon a statute for a penalty or forfeiture, "when the "action is given to an individual, or to an individual and the State, "except when the statute imposing it prescribes a different limitation."

"SECTION 541. If, when the cause of action accrues against a per- "son, he is out of the State, the action may be commenced within "the term herein limited, after his return to the State, and if, after "the cause of action accrues, he departs from the State, the time of "his absence is not part of the time limited for the commencement "of the action."

"SECTION 554. This title does not affect actions against directors "or stockholders of a corporation, to recover a penalty or

4 "forfeiture imposed, or to enforce a liability created by law; "but such actions must be brought within three years after "the discovery by the aggrieved party of the facts upon which the "penalty of forfeiture attached or the liability created (*sic*)."

Question Certified.

Upon the facts above set forth, the question of law concerning which this court desires the instruction of the Supreme Court, for its proper decision, is:

"May a defendant in an action of the kind specified in section 554 of the Code of Civil Proceedure of Montana, avail of the limitation therein prescribed, when the action is brought against him in the court of another State?"

In accordance with the provisions of section 6 of the act of March 31, 1891, establishing courts of appeal etc., the foregoing question of

law is by the circuit court of appeals for the second circuit hereby certified to the Supreme Court.

February 25, 1903.

WM. J. WALLACE,
Circuit Judge.
E. HENRY LACOMBE,
Circuit Judge.
ALFRED C. COXE,
Circuit Judge.

5 [Endorsed:] United States circuit court of appeals, second circuit. Andrew J. Davis, pl'ff in error, *vs.* Hiram R. Mills and Clarence C. Frost, def'ts in error. Certification of question to the Supreme Court. United States circuit court of appeals, second circuit. Filed Feb. 25 1903 William Parkin, clerk.

6 UNITED STATES OF AMERICA, }
Southern District of New York. }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit do hereby certify that the foregoing certificate was filed and entered of record in this office on the 25th day of February, one thousand nine hundred and three, and, as directed by the judges of said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

New York, February 27th, 1903.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

7 [Endorsed:] United States circuit court of appeals, second circuit. Andrew J. Davis *v.* Hiram R. Mills & an'r. Certificate.

8 At a stated term of the United States circuit court of appeals for the second circuit, held at the court rooms in the post office building, city of New York on the 16th day of March, 1902.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, judges.

ANDREW J. DAVIS, Plaintiff in Error, }
vs. }
HIRAM R. MILLS and CLARENCE C. FROST, Defendants in Error. }

A motion having been made to amend the statement of facts in the certification of question herein to the Supreme Court,

It is ordered that the statement of facts be amended by inserting after the words "the defendants are and always have been citizens

and residents of Connecticut, and at all the times mentioned in the complaint were trustees of the said Obelisk Mining Company" the words "and none of them has been in Montana at any time since 1890."

It is further ordered that a certified copy of this order be transmitted to the clerk of the Supreme Court of the United States to be annexed to the original certificate.

A true copy.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

WM. J. WALLACE.
E. HENRY LACOMBE.
ALFRED C. COXE.

9 [Endorsed:] United States circuit court of appeals, second circuit. Andrew J. Davis *v.* Hiram R. Mills. (Copy.) Order.

10 [Endorsed:] File No. 18,865. Supreme Court U. S., October term, 1903 Term No. 235 Andrew J. Davis *vs.* Hiram R. Mills. Certified copy of order amending statement of facts. Filed March 21", 1903.

Endorsed on cover: File No. 18,865. U. S. circuit court of appeals, second circuit. Term No. 235. Andrew J. Davis *vs.* Hiram R. Mills and Clarence C. Frost. (Certificate.) Filed March 14, 1903.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

NO. 235.

ANDREW J. DAVIS

vs.

HIRAM R. MILLS ET AL.

On certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF ANDREW J. DAVIS IN OPPOSITION TO MOTION TO REQUIRE CIRCUIT COURT OF APPEALS TO CERTIFY TO THIS COURT THE ENTIRE RECORD.

Statement.

This is an action brought against the defendants to enforce a liability arising under a statute of the State of Montana making directors or trustees of corporations organized under the laws of said State liable for the debts of the company. The statute in question is quoted in Brief of Counsel for Hiram R. Mills, page four, and is a part of the general law of said State providing for the incorporation of companies for manufacturing, mining and other purposes and is the law under which the Obelisk Mining & Concentrating Company (of which company the defendants were trustees) was incorporated, as appears from the Complaint of the plaintiff. This law also contains the further provision:

"Sec. 463: If any certificate or report made or public notice given by the officers of any such company, in pursuance of the provisions of this chapter, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof."

The defendants demurred to the Complaint of plaintiff upon the ground,

"Because it appears from said Complaint that the several causes of action therein alleged each and all accrued more than three years prior to the commencement of this action, and did not accrue within three years prior to the commencement of this action."

Transcript filed in C. C. A., p. 32.

The demurrer was sustained by the trial Court and a judgment entered for defendants. Whereupon the plaintiff sued out a writ of error and the cause was removed to the Circuit Court of Appeals for review.

Argument.

I.

Counsel for defendant has referred to various questions, arising in the cause prior to the determination of the demurrer mentioned. He does not contend that any one of these questions was either presented to or considered by the Circuit Court of Appeals or that they were before that Court for consideration, or that they could be considered by this Court if the entire record were sent up. We will therefore pass them, only saying that none of them in any way affects the consideration of the question certified, that they are all well settled by uniform adjudications, and that no one of them is of sufficient importance, in view of past determinations of the law, to demand the judgment of this Court. To support our contention we refer to the learned opinions of the trial Judges delivered upon the determination of the several questions.

Davis vs. Mills, 83 Fed., 982.

Davis vs. Mills, 99 Fed., 39.

II.

It was argued by Counsel for defendants in error in the Circuit Court of Appeals that the cause of action set forth is barred by the provisions of

Sec. 1120 Gen. Stats. Conn., Rev. 1902.

This section reads as follows:

"No suit for any forfeiture upon any penal statute shall be brought but within one year next after the commission of the offense."

And if not barred by the section quoted, that said cause of action is barred by

Sec. 515 Code Civ. Proced., Mont.

That section reads:

"Sec. 515: Within two years: I. An action upon a statute for a penalty or forfeiture, when the action is given to an individual or to an individual and the State, except when the statute imposing it prescribes a different limitation."

And that if said cause of action is not barred by either of the above sections that then it is barred by

Sec. 554 Code Civ. Proced., Mont.

That section reads:

"Sec. 554: This title does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability created."

The circuit Court of Appeals decided that the action is not barred either by Sec. 1120 Gen. State. Conn. quoted, nor by Sec. 515 Code Civ. Proced., Mont., quoted, and certified to this Court the question as to whether the action is barred by Sec. 554 Code Civ. Proced., Mont., quoted.

Our contention is:

1. *That it has been settled by the uniform decisions of Courts of highest authority that the action is not barred by Sec. 1120 Gen. Stats. Conn.*

2. *That it is likewise settled by uniform adjudications that the plaintiff's right to maintain this action in the State of Connecticut is in nowise affected by Sec. 515 Code Civ. Proced., Mont.*

3. *That the determination of the question certified does not necessarily involve the consideration of either of the above questions.*

4. *That neither question one nor two above mentioned is of sufficient importance in view of past adjudications to demand the judgment of this Court.*

5. *The motion to require the whole record to be certified up should be overruled.*

I.

Both Sec. 460 and Sec. 463 of the Compiled Statutes of Montana of 1887 were adopted from the State of New York. Said Sec. 463 appears as Sec. 21 in Statute of New York of 1875, C. 611. That statute received interpretation by this Court in the case of

Huntington vs. Attrill, 146 U. S., 657.

That was a suit in equity brought in the Circuit Court of Baltimore by the plaintiff to subject certain property to the satisfaction of a judgment recovered in a Court of the State of New York. The bill alleged not only said judgment, but the original liability upon which it was founded. The judgment in question had been recovered against the defendant on account of a liability arising under the provisions of Sec. 21 Statute of New York of 1875, C. 611, referred to above. The original cause of ation, therefore, upon which that judgment was recovered was identical with that which is the foundation of the present action, with the exception that the liability in that case arose under the provision making the directors of the corporation liable for the debts of the company, in case the report filed was false in any material respect, while in the present action the liability arises under the provision which makes the directors so liable in the event of a failure to file a report. It is plain that the two actions can not be distinguished upon that ground.

In that case the defendant made the objection that the suit could not be maintained in Maryland, inasmuch as the liability, which was the foundation of the judgment recovered in New York, was in the nature of a penalty arising under a statute of the State of New York, and which penalty could not be enforced beyond the territorial limits of the State of New York. This objection was overruled in the trial Court, but its decision was reversed by the Appellate Court and the suit was brought into this Court on writ of error to review such decision. This Court there determined that the nature of the original liability was not changed by recovering judgment upon it. The language of the Court upon this question was:

"The essential nature and real foundation of a cause of action, indeed, are not changed by recovering judgment upon it."

The Court then proceeded to consider the character of the original cause of action and holding that it was not for the recovery of a penalty in the strict and international sense, reversed the judgment of the Court of Appeals of the State of Maryland.

The Court in that case in determining the question of whether the liability was penal in its nature considered the different classi-

fications of penalties and uses the following language:

"Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State, and which, by the English and American statutes, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal."

And the Court further says:

"The test whether a law is penal in the strict and primary sense is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs*.'"

In the course of the discussion the Court referred to the case of

Wisconsin vs. Pelican Life Ins. Co., 127 U. S., 265,

where the liability sought to be enforced was held to be penal in the strict and international sense. It was pointed out, and the decision of the Court in that case was approved because of the fact, that the action was brought in the name of the State and the proceeds of the action when recovered went to the benefit of the State, and the action was for a recovery for an infraction of a law intended for the protection of the general public, and not an enforcement of a civil right given to a private individual.

It must be conceded, therefore, that it has been distinctly determined by a decision of this Court, in which as to this proposition there was no dissent, that the liability which is the foundation of the present action is to be classified as arising out of a private wrong and not a public wrong, according to Blackstone's classification.

It has likewise been repeatedly decided by the Court of last resort of the State of Connecticut that actions which come within the provisions of Sec. 1120 Gen. Stats. Conn., quoted above, are actions for public wrongs, and that whenever it has been determined in a particular case that the action is for a recovery for a private wrong, then it has been held that that section has no application.

The Supreme Court of Errors of Connecticut in the case of

Plumb vs. Griffin, 50 At. Rep., 1,

said with reference to the Connecticut statute of limitation referred to, that it is only applicable to a penal statute,

"one that declares a forfeiture, and one that deals with an offense. And it must be a forfeiture and an offense in the sense in which these terms are used in a penal statute. Penal statutes,

strictly and properly, are those imposing punishment for an offense against the State. And the expression 'penal statutes' does not ordinarily include statutes which give a private action against a wrongdoer. The words 'penal' and 'penalty' in their strict and primary sense denote a punishment, whether corporal or pecuniary, imposed and enforced by the State for a crime or offense against its laws."

The following are other cases construing this statute of limitation:

Wells vs. Cooper, 17 At., 281.
Borough vs. Hall, 64 Conn., 426.
Drake vs. Watson, 4 Day, 37.
Ross vs. Bruce, 1 Day, 100.

An examination of these cases will disclose that in every case where the statute in question was held applicable the action was brought to recover for an infraction of a law made for the benefit of the general public, and that it has never been held applicable in any case where the recovery went wholly to the benefit of an individual. It must therefore be conceded that the question has been determined by judicial authority of the highest character.

In Mitchell vs. Hotchkiss, 48 Conn., 18,

the sole question for determination was whether the cause of action survived. The liability was spoken of in the opinion as a penalty, but the question was not necessary to a determination of the case, however, and the remark of the Court is clearly *obiter*. Besides, there is nothing in the case which in any way indicates the view of the Court as to whether the section of the statute of limitations referred to would be applicable.

2.

Upon plain principles universally acknowledged Sec. 515 of the Code of Civil Procedure of Montana is utterly inapplicable to an action brought in a Court sitting in the State of Connecticut, for it is a universal rule, to which there are no exceptions, that the Courts of one State or Sovereignty do not enforce the statute of limitations of other States or Sovereignties, because statutes of limitations, properly speaking, relate to the remedy solely, and as to the remedy the law of the forum must govern.

Townsend vs. Jemison, 9 How. U. S., 407.
Michigan Ins. Bank vs. Eldred, 130 U. S., 693.

It was contended by the learned Counsel for the defendant in

error in the Circuit Court of Appeals that Sec. 515 Code Civil Procedure of Montana was not, properly speaking, a statute of limitation, but that it inhered in and governed the right sought to be enforced. His contention was that the case came within the rule stated by Judge (now Associate Justice) Brown in the case of

Boyd vs. Clark, 8 Fed., 849, as follows:

"Where a statute gives a right of action unknown to the common law, and either in a proviso to the section conferring the right or in a separate section limits the time within which an action shall be brought, such limitation is operative in any other jurisdiction wherein the plaintiff may sue."

A casual examination of the statutes of Montana will show that Sec. 515 Code of Civil Procedure of Montana is not a part of the statute which gives the right of action, and that it was never at any time in the history of the legislation of that State a part of such statute, but that it is a part and always has been a part of the general statutes of limitations of the State, and relates to the remedy solely.

The statute imposing the liability is Sec. 460 of the General Laws of the State of Montana, comprising the fifth division of the Compiled Statutes of 1887 and found on page 728 of the same. The limitation statute in force at the time the liability arose, which is the subject of this suit, is Sec. 45 of the Code of Civil Procedure, is a part of a chapter entitled "Of the Time of Commencing Actions," and is also found in the Compiled Statutes of 1887, which is a compilation merely of laws theretofore enacted and then in force. The Code of Civil Procedure, embracing Sec. 45 (limitation statute) was enacted February 16, 1877. See Laws of Montana, Tenth Session, 1877, pages 42 to 215 inclusive. The liability section was a part of the first general act passed by the Legislature of the Territory of Montana for the organization of corporations, approved June 12, 1872, as will be seen by a notation on page 462 of the Revised Statutes of 1879. It will thus be seen that the limitation statute and the liability statute never formed parts of the same act at any time prior to the time when the liability which is the subject of the present suit arose. After plaintiff's right of action had accrued and matured, the Codes of Montana of 1895 were adopted and the two statutes were re-enacted and continued in force as a continuation of the old law. By this codification of the laws the two statutes, however, still continue as parts of separate and distinct acts. Sec. 45 Code of Civil Procedure, Compiled Statutes of 1887, appears as Sec. 515 of the new code, the period of limitation

being changed, however, from one year to two years. Sec. 460 of the General Laws, Compiled Statutes of 1887, appears Procedure wherein is found the limitation statute was approved February 14, 1895 (see memorandum at close of same). The Civil Code wherein appears the liability statute was approved February 19, 1895 (see memorandum at close of Civil Code).

In no proper sense, therefore, can Sec. 515 of the Code of Civil Procedure be considered as a part of the section which declares the liability of trustees or directors of corporations for failure to file an annual report. The limitation statute, therefore, is strictly a *general* statute of limitation, and according to the decision of this Court in

Union Pacific Ry. Co. vs. Wyler, 158 U. S., 285,

could have no application to an action brought in the State of Connecticut.

3, 4 *and* 5.

The foregoing abbreviated discussion of propositions one and two is sufficient, we think, to make it plain to the Court that a consideration of the question certified does not necessarily involve their consideration.

It must also be plain, we think, that with respect to proposition one, that the liability which is the subject of this suit has been decided by this Court to be based upon a *private wrong*, and that it has been decided by the Court of last resort of the State of Connecticut, which decision is a law affording a rule of decision for the federal courts that the section of the statute of limitations of Connecticut relied upon by the defendants as barring the action, does not apply to actions for private wrongs; and with respect to proposition Two it is likewise plain that it is well settled by decisions of this Court that Sec. 515 of Montana Code of Civil Procedure, being a general statute of limitation of Montana cannot have the effect of barring this action brought in Connecticut.

The propositions being thus settled, the defendant is clearly not in a position to demand their reconsideration by this Court. Particularly so in view of the fact that the plaintiff has already borne the burden of this action for six years past, and the motion is not made until after the plaintiff has, at his expense, had the record printed as certified.

We most respectfully submit that the motion should be denied.

JOHN A. SHELTON,
Of Counsel for Andrew J. Davis.

IN THE

FILED

MAR 2 1904

JAMES H. MCKENNEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 283

ANDREW J. DAVIS

vs.

HIRAM R. MILLS, ET AL.

On certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF ANDREW J. DAVIS ON QUESTION CERTIFIED.

T. J. WALSH and
JOHN A. SHELTON,
Counsel for Andrew J. Davis.

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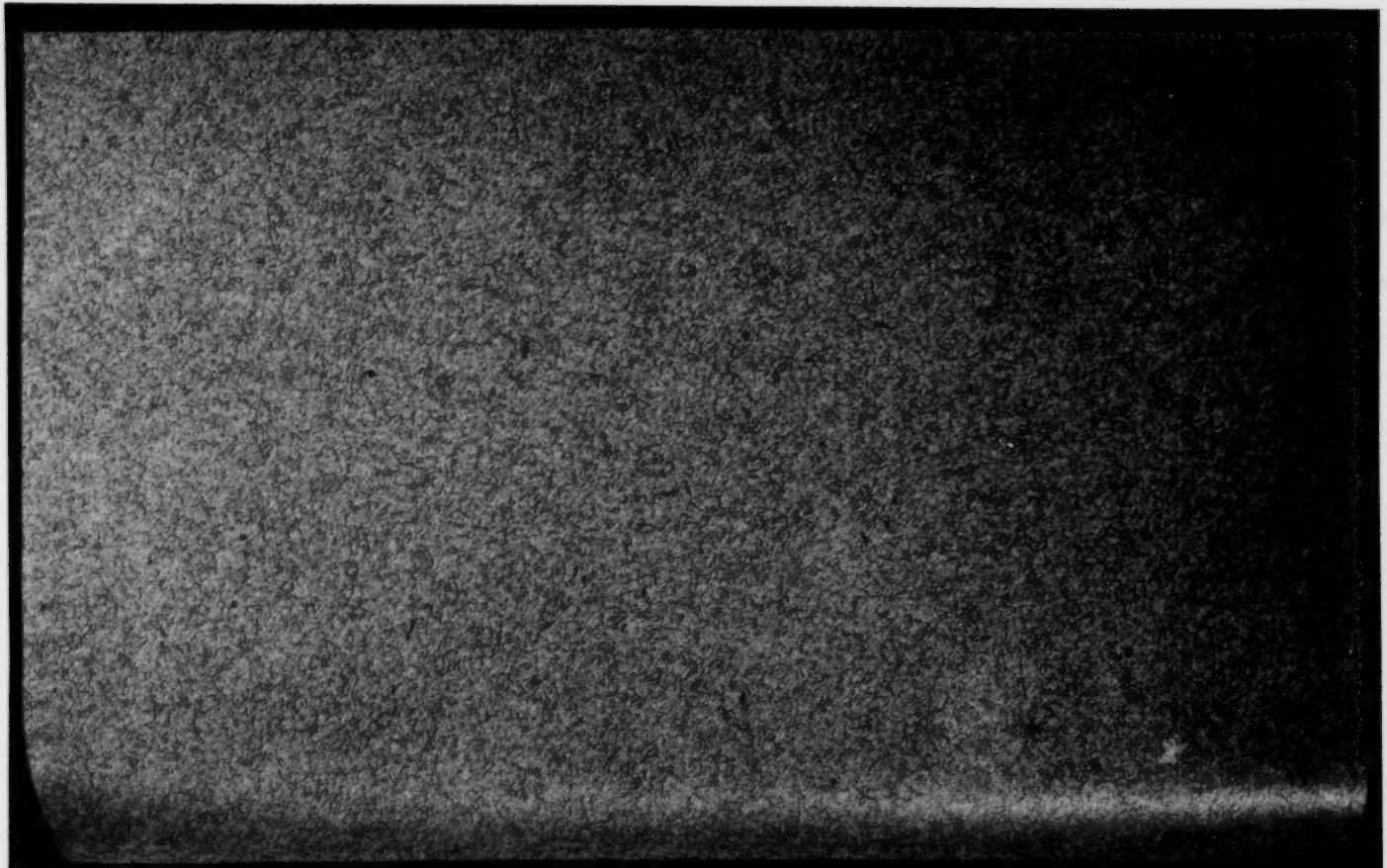

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 285

ANDREW J. DAVIS

vs.

HIRAM R. MILLS, ET AL.

On certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF ANDREW J. DAVIS ON QUESTION CERTIFIED.

STATEMENT.

This case is before this Court on a question certified by the United States Circuit Court of Appeals for the Second Circuit.

The proposition of law or question which the Court is called upon to answer is stated in the certificate (omitting the statutes quoted) as follows:

"Statement of Facts.

"The plaintiff is a citizen of Montana and the owner "by assignment of three causes of action (for goods sold "and on a promissory note) against the Obelisk Mining and "Concentrating Company, a Montana corporation. The in- "debtedness of the company upon these causes of action "accrued July 31, 1892, July 1, 1892 and December 12, "1892, respectively. The defendants are and always have "been citizens and residents of Connecticut, and at all "times mentioned in the complaint were trustees of the said "Obelisk Mining Company and none of them has been in "Montana since 1890. The statute of Montana provides "that within twenty days from the first day of September "every such company shall annually file a specified report, "and that if it 'shall fail to do so, all the trustees of the "compay shall be jointly and severally liable for all the "debts of the company then existing, and for all that shall "be contracted before such report shall be made.' Section "460 of chapter 25 of the fifth division, Compiled Statutes "of Montana which was in force when the cause of action "arose. Re-enacted as section 451 of the Civil Code of "Montana, which went into effect July 1, 1895."

"The Obelisk Mining Company failed to file certain of "the required reports and the cause of action sued upon "here, against the defendants as trustees to recover the "debts of the company, accrued September 22, 1893, or "prior thereto. This action was brought to enforce the "joint and several liability of the defendants under the stat- "ute on July 30, 1897. * * * * * * * * *"

"Question Certified."

"Upon the facts above set forth the question of law con- "cerning which this court desires the instruction of the "Supreme Court, for its proper decision, is:"

"May a defendant in an action of the kind specified "in section 554 of the Code of Civil Procedure of Montana, "avail of the limitation therein prescribed, when the ac- "tion is brought against him in the court of another State?"

Cert., pp. 1, 2, 3 and 4.

Omitting the statutes quoted the question may be more briefly stated as follows:

Will section 554 of the Code of Civil Procedure of Montana (1895) operate to bar an action begun on the 30th day of July, 1897, in the United States Circuit Court for the District of Connecticut, against a defendant who has never been in Montana since 1890, upon a liability arising against him as a trustee of a Montana corporation for failure to make or file, within twenty days from the 1st day of September, 1893, the report required by Section 460, Chapter 25, Fifth Division, Compiled Statutes of Montana of 1887?

ARGUMENT.

This being an action at law brought in the United States Circuit Court for the District of Connecticut,

(Cert. p. 1, ll., 9-10.)

the time within which the action can be brought is determined by the *lex fori*; in this case the statues of Connectctut.

In Townsend vs. Jemison, 9 How. (U. S.), 407,

it was said that the above rule had then "become a formulary in international jurisprudence."

This Court there also said:

> "The rule in the Courts of the United States in respect "to pleas of the statutes of limitations has always been "that they strictly affect the remedy and not the merits."

The correctness of this rule has been many times reaffirmed.

Michigan Ins. Bank vs. Eldred, 130 U. S., 693.
Telegraph Co. vs. Purdy, 162 U. S. 329.

It has also been quite uniformly followed.

Whitman vs. Citizens Bank, 110 Fed., 503-512.
Dexter vs. Edmands, 89 Fed. 467.
Schiffer vs. Trustees of Columbia College, 87 Fed. 166.

If section 554 of the Code of Civil Procedure of Montana is a statute of limitation it would seem therefore that the question propounded must be answered in the negative, since according to the rule, the limitation statutes of Connecticut alone can be appealed to as barring the action.

We are met with the contention however, that the section of the statutes of Montana referred to is not, properly speaking, a

statute of limitation, but that the case is one where the right itself, which is the basis of the action, is granted only upon condition that suit be brought to enforce it within the time specified, and after the lapse of the specified time without suit being brought, the right itself is extinguished, and no suit for its enforcement can be maintained in any jurisdiction whatever.

We submit in answer that the bare reading of the Montana statutes applicable is sufficient to show that the argument is without any sound foundation. The true rule was most clearly stated by Judge (now Associate Justice) Brown in the case of

Boyd vs. Clark, 8 Fed., 849,

as follows:

> "Where a statute gives a right of action unknown to "the common law, and, either in a proviso to the section "conferring the right or in a separate section, limits the "time within which an action shall be brought, such limi- "tation is operative in any other jurisdiction wherein the "plaintiff may sue."

The rule was applied in that case, which was an action brought to recover damages for the death of a person occurring in the Province of Ontanio, by the law of which Province an action was awarded, but it was provided that every such action should be commenced within twelve months after the death of the deceased person.

The rule has been frequently applied in actions brought upon statutes giving a right of action for wrongful death, and the reported cases arising under these statutes very clearly indicate its scope and applicability.

Most of these statutes are founded on what is commonly known as Lord Campbell's act, an act of the English Parliament giving a right of action which did not exist at the common law, for damages for the death of a person when caused by the wrongful act or neglect of another. It provided that an action to enforce the right must be commenced within two years.

In the case of

Hamilton vs. Hannibal & St. J. R. Co., 18 Pac, 57,

the action was brought in the State of Kansas to recover damages on account of the death of a person occurring in the State

of Missouri. The action was brought by the widow of the deceased. Under the statute of the State of Missouri granting the right of action, it was provided that the action might be maintained by the wife if instituted within six months. The Court said:

"The statute upon which she based her action provides, "as we have seen, that the widow may sue and recover "damages; but, if she fails to bring her action whithin six "months, the right thereafter vests in her minor children. "The right of action under the statute, therefore, only re- "mained absolutely in the wife for the period of six months; "after that time it vested absolutely in the children.. The "provision designating when and by whom a suit may be "brought is more than a mere limitation; it is a condition "imposed by the legislature, which qualifies the right of re- "covery, and upon which its exercise depends. The Su- "preme Court of Missouri has recently examined and inter- "preted this statute, and in an elaborate opinion reaches "the conclusion that the right is a conditional one; and the "condition, being annexed to the right as given in the stat- "ute, modifies the same, and, in fact, forms a part of the "right itself. Barker vs. Railroad Co., 91 Mo., 86."

Upon the other hand, the statute of the State of Kansas granting a right of action in cases of wrongful death did not declare the time within which the action might be commenced to enforce the right, but left the determination of that question to be solved by the general statutes of limitations of that state.

An action was brought in the State of Missouri to enforce the right arising under the statute of the State of Kansas on account of a death occurring in that state, and this Court held that the Kansas statute had no application, and that the only statute applicable was the statute of the State of Missouri.

Union Pacific vs. Wyler, 158 U. S., 285.

In the case of

Laidlow vs. O. R. & N. Co., 81 Fed. 876,

the Court had under consideration statutes of the State of Oregon, as follows:

"When the death of a person is caused by wrongful "act or omission of another, the personal representatives "of the former may maintain an action at law therefor

"against the latter, if the former might have maintained "an action, had he lived, against the latter, for an injury "done by the same act or omission. Such action shall be "commenced within two years after the death." Hill's Ann. Code, 371.

"Every boat or vessel, used in navigating the waters "of this state * * * shall be liable and subject to a "lien * * * for all * * *damages or injuries done "to persons or property by such boat or vessel." Id., Sec. 3690.

The Court said with reference to these statutes:

"The local law giving the lien, however, conditions "the right upon the commencement of the action within "two years after the death. Time has thus been made 'of "the essence of the right,' and the right is lost if the time is "disregarded. The Harrisburg, 119 U. S., 199; 7 Sup. "Ct., 140."

The case in the 119th United States, above referred to, was of a similar character.

It was an action in admiralty brought in the Eastern District of Pennsylvania to recover damages suffered on account of the death of one occasioned by a collision occurring within the jurisdiction of the State of Massachusetts. A statute of the State of Pennsylvania provided as follows:

"That whenever death shall be occasioned by unlaw- "ful violence or negligence, and no suit for damages be "brought by the party injured, during his or her life, "the husband, widow, children or parents of the deceased, "and no other relative may maintain an action for and "recover damages for the death thus occasioned. The "action shall be brought within one year after the death "and not thereafter." Brightly, Purd. Dig. 11th Ed., 1268, Secs. 3, 4, 5; Act of April 15, 1851, Sec. 18; Act of April 6, 1855, Secs. 1, 2.

And a statute of the State of Massachusetts provided as follows:

"If, by reason of the negligence or carelessness of a "corporation, or of the unfitness or gross negligence of "its servants or agents while engaged in its business, "the life of any person, being in the exercise of due dili- "gence * * * is lost, the corporation shall be pun- "ished by a fine of not exceeding five thousand nor less

"than five hundred dollars, to be recovered by indictment "and paid to the executor or administrator for the use of "the widow and children. * * * Indictments against "corporations for loss of life shall be presented within "one year from the injury causing the death." Gen. Stat. Mass. 1860, Chap. 63, Secs. 97-99; Stat. 1874, Chap. 372, Sec. 163.

These statutes are quoted in the opinion of Chief Justice Waite. It was contended that the right of action could be maintained in admiralty independent of the statute, but the Court denied this contention and held that the action must be maintained, if maintained at all, on the statutes above referred to, and commenting upon the same, the opinion says:

"This brings us to the second branch of the question, "which is, whether, with the Statutes of Massachusetts "and Pennsylvania above referred to in force at the time "of the collision, a suit in *rem* could be maintained "against the offending vessel if brought in time. About "this we express no opinion, as we are entirely satisfied "that this suit was begun too late. The statutes create "a new legal liability, with the right to a suit for its en- "forcement, provided the suit is brought within twelve "months, and not otherwise. The time within which the "suit must be brought operates as a limitation of the "liability itself thus created, and not of the remedy alone. "It is a condition attached to the right to sue at all. No "one will pretend that the suit in Pennsylvania or the in- "dictment in Massachusetts, could be maintained if "brought or found after the expiration of the year; and "it would seem to be clear that, if the admiralty adopts "the statute as a rule of right to be administered within "its own jurisdiction, it must take the right subject to the "limitations which have been made a part of its existence. "It matters not that no rights of innocent parties have "attached during the delay. Time has been made of the "essence of the right, and the right is lost if the time is "disregarded. The liability and the remedy are created "by the same statutes, and the limitations of the remedy "are therefore, to be treated as limitations of the right." In

Munos vs. Southern Pac. Co., 51 Fed., 188,

an action was brought in the Circuit Court for the Western

District of Texas to recover on account of a death occurring in the Territory of New Mexico. The New Mexico act contained a section providing a limitation of time within which the action to enforce the right given by the statute should be commenced. This was subsequently repealed and then the repealing act was repealed, and the question arose whether thereby the original limitation section was revived. The Court said:

"If the said section 2316 (the limitation section) of "the Compiled Laws of New Mexico was not revived by "the repeal of the repealing act, then there was no period "of limitation prescribed as a part of the remedy given "by section 2308 of the Compiled Laws of New Mexico, "under which the present action was brought, otherwise "than as provided by the general law of limitations in "said territory, in which case the laws of Texas in regard "to the limitation of actions would apply."

The true rule is declared in this case, namely, that if appeal must be made in the state of the forum to general statutes of limitation of the state in which the cause of action arose, the appeal is ineffectual, for such general statutes of limitations do not apply. If the very statute giving the right prescribes a time within which the action must be brought, then the action must be brought within that time, wherever it is commenced.

The opinion in the case last above cited conlcudes with the following clear statement of the rule:

"Where torts are committed in foreign countries, or "beyond the territorial jurisdiction, the *lex fori* governs, "no matter whether the right of action depends upon the "common law or a local statute, unless the statute which "creates or confers the right limits the duration of such "right to a prescribed time."

In Boyd vs. Clark, above referred to, Judge Brown said in the opinion:

"If this statute (the statute of Ontario giving the "right to maintain the action for the death) contained "no limitation of time, within which the action must be "brought, and the time had been left to depend upon the "general statutes of limitation in the Province of On-

"tario, it is clear that we should have disregarded such "statute and permitted the plaintiff to bring this action "at any time before actions of this description would be "barred by the statutes of this state."

In

Pittsburg vs. Hine, 25 Ohio St., 629,

the act gave compensation for death by wrongful act, neglect or default, and the section giving the right concluded, "provided such action shall be commenced within two years." It was held that the provision was a condition of the right which attached to it in any state in which it was sought to be enforced.

A statute considered by the Supreme Court of North Carolina giving damages for wrongful death, provided that the person causing the death "shall be liable to an action for damages to be brought in one year after such death." With reference to this, the Court said:

"This is not strictly a statute of limitations. It gives "a right of action that would not otherwise exist, and the "action to enforce it must be brought within one year "after the death of the testator or intestate, else the right "of action will be lost."

Taylor vs. Cranberry, 94, N. C., 525.

In

Lambert vs. Ensign, 26 S. E., 431,

the Court had under consideration a statute giving a cause of action for wrongful death, the section giving the right, concluding, "Provided that every such action shall be commenced within two years after the death of such deceased person." This was also held to be a condition.

In opposition to the cases last above referred to may be put the case of

O'Shields vs. Georgia Pac. R. Co., 85 Ga., 621.

This was an action brought in the State of Georgia for a death caused by the negligence of the defendant in the State of Alabama. The Court said:

"We have examined the Alabama statute, both as "set out in the Code and as it appears in the Acts of 1885, "p. 115, and in neither is there any limitation as to the

"time within which the action based upon the statutory "right is to be brought. The limitation prescribed is "found alone in the General Limitation Law of Alabama, "which fixes the limitation at one year for * * * * * "actions for any injury to the person or rights of another "not arising from contract and not herein specifically "enumerated."

The Georgia statute applicable to the case was two years, and it was held that the Alabama statute did not apply and that the Georgia statute did, and that the action was not barred.

Reference was made in the opinion to an earlier case decided by the same Court,

Selma R. & R. Co. vs. Lacy, 49 Ga., 107,

which arose upon an Alabama statute also, but a different one from that under consideration by the Court, which read as follows:

"When the death of a person is caused by the wrong-"ful act or omission of another, the personal representa-"tives of the former may maintain an action against the "latter at any time within one year thereafter, if the "former could have maintained an action against the lat-"ter for the same act or omission had it failed to produce "death."

It was held under this statute in that case that the action could be maintained in Georgia after the expiration of a year, and contrasting the effect of the two statutes, the Court said:

"According to all the authorities, an action under "such a statute as this could not be maintained any-"where after the bar had attached in the local jurisdic-"tion, for the reason that after that time the right would "be extinct as well as the remedy; but the Act of 1885, "upon which the present suit is founded, contains no such "terms and there is no more reason for holding that the "General Limitation Law of Alabama, which we have "cited above, extinguishes the statutory rights of action "to which it applies, than for holding that it extinguishes "the common law rights of action to which it is appli-"cable."

The statute of Montana prior to the adoption of the Codes of 1895, giving a right of action for wrongful death, consisted

of two sections. Section 981 provided that the person causing the death should be liable, and section 982 first provided by whom the action should be brought and for whose benefit, and fixed a limit of recovery, and then concluded, "Provided that every such action shall be commenced within three years after the death of such person."

An action was brought under this statute in the Circuit Court of the United States for the Distict of Minnesota. The Minnesota statute read as follows:

> "When death is caused by the wrongful act or omis-
> "sion of any party the personal representatives of the de-
> "ceased may maintain an action, if he might have main-
> "tained an action had he lived, for an injury caused by
> "the same act or omission, but the action shall be com-
> "menced within two years after the act or omission by
> "which the death was caused. The damages thereon can-
> "not exceed $5,000, and the amount recovered is to be for
> "the exclusive benefit of the widow, and next of kin, to
> "be distributed to them in the same proportion as the
> "personal property of the deceased person." Gen. St. 1877, C. 77, Sec. 2.

It was held that the limitation in each of these statutes was in the nature of a condition or incident of the right, and that the Minnesota statute had reference only to causes of action arising in the State of Minnesota, and that the action could be maintained within the period limited by the Montana statute, although the period limited for the commencement of similar actions under the Minnesota statutes for deaths caused in the State of Minnesota had expired.

Theroux vs. Northern Pacific, 64 Fed., 821.

In an action brought in the United States Circuit Court for the Southern District of New York, it was held that an action for death occurring in New Jersey could not be maintained after the period limited by the New Jersey statute, but in that case the period was prescribed in the very act giving the right, which was in the following terms:

> "And in every such action the jury may give such
> "damages as they shall deem fair and just with reference
> "to the pecuniary injury resulting in such death to the

"wife and next of kin of such deceased person; provided, "that every such action shall be commenced within 12 "calendar months after the death of such deceased per- "son." 1 Gen. St., p. 1188.

Stern vs. LaCompagnie, 110 Fed., 996.

The Circuit Court of Appeals for the First Circuit had under consideration a statute giving an action for wrongful death in the case of

Boston & M. R. R. vs. Hurd, 108 Fed., 116.

Touching the objection that the action was not brought within the time limited by the Massachusetts statute giving the right, the Court said:

"We have observed that the Massachusetts statute, "on which the suit is now rested, gives the right of action "with a qualified provision that it must be brought within "one year from the time of the injury. This is undoubt- "edly based on a matter of local policy, which justly fol- "lows the statute wherever it goes. We must be careful "to notice that a limitation of this kind, incorporated into "a statute giving a cause of action which did not exist at "common law, is substantially unlike a general statute "of limitations. A general statute of limitations must be "pleaded in defense, and it can be replied to in various "ways. A limitation in a statute like this under consid- "eration must be met by pleadings on the part of the "plaintiff and by the plaintiff's proofs."

The character of those statutes in which the time within which an action must be begun is a condition of the right is further illustrated by the statute under consideration in

Walsh vs. Mayer, 111 U. S., 31,

which is as follows:

"The amount of conventional interest shall in no "case exceed eight per cent. under pain of forfeiture of the "entire interest so contracted. If any person hereafter "shall pay on any contract a higher rate of interest than "the above, as discount or otherwise, the same may be "sued for and recovered within twelve months from the "time of such payment."

Actions to enforce liabilities of stockholders in corporations have frequently given rise to the application of the rule appealed to. Sometimes, indeed not infrequently, the statute

creating the liability provides not only the time within which the action must be begun to enforce it, but prescribes the particular remedy. Both of these ordinarily become conditions of the right, and the time feature always does. In other cases, the time within which the action must be begun is not fixed in the statute creating the liability, but is left to be determined by the general statute of limitations. In the former case, under the adjudications, the action must be begun, even in a foreign state, within the time fixed by the statute creating the right. In the latter case, the statutes of limitations of the state giving the right have no application, and the action may be brought within the time fixed by the statutes of limitations of the state where the action is brought.

A case of this character was

Dexter vs. Edmands, 89 Fed., 467.

The Court held that the question of the bar of the statutes of limitations was to be determined by the *lex fori* and in the course of the opinion said:

"The sixth paragraph of the answer is a plea of the "Kansas statute of limitations. It has been repeatedly "decided by the Supreme Court that the time during "which an action can be brought is determined by the *lex "fori;* in this case, the statute of Massachusetts. Town-"send vs. Jemison, 9 How., 407; Telegraph Co. vs. Purdy, "162 U. S., 329, 339, 16 Sup. Ct., 810. It is true that, as "stated by Judge (now Mr. Justice) Brown in Boyd vs. "Clark, 8 Fed., 849, 'where a statute gives a right of ac-'tion unknown to the common law, and either in a proviso "or in a separate section limits the time within which an "action shall be brought, such limitation is operative in "any other jurisdiction wherein the plaintiff may sue.' "See Walsh vs. Mayer, 111 U. S., 31, 37, 4 Sup. Ct. 260. "But the Kansas statute of limitations here relied upon "by the defendant is not a limitation upon the particular "statutory right of action here sued upon, but is a gen-"eral statute limiting actions upon a 'contract not in "writing, express or implied,' and 'upon a liability cre-"ated by statute other than a forfeit or penalty.' Such a "statute does not govern this suit brought in this court."

To the same effect is

Schiffer vs. Trustees of Columbia College, 87 Fed., 166.

In a concurring opinion in

Hobbs vs. National Bank, 101 Fed., 75,

an exactly similar case arising under the same constitution and statutes, Judge Lacombe (without giving his reasons) expressed an opinion contrary to his decision in

Schiffer vs. Trustees of Columbia College, supra.

His concurring opinion in full is as follows:

"I concur fully in the memorandum filed on denying "petitions for rehearing. Nevertheless, I am individually "of the opinion that the statute of limitations applicable "to cases of this sort is the statute of the state whose law "making power has created the liability, or rather that "the action will not be maintained in another state when "a period of time has elapsed which would defeat the ac- "tion of the home state, although possibly that period "may be still further curtailed by the statute of limita- "tions of the state in which the action is brought."

In the case of

Whitman vs. Citizen's Bank, 110 Fed., 503,

however, the United States Circuit Court of Appeals for the Second Circuit (Judges Wallace, Cox and Shipman sitting) said with reference to the plea of the statute of limitations urged against an action upon a liability arising under the same statute:

"Inasmuch as the Kansas statute is a general one, "and the statute in regard to the liability of stockhold- "ers of an insolvent corporation to its creditors do not "contain provisions in regard to the limitations of actions, "we think that the statutes of the forum in which the suit "was brought must apply, and that the Kansas decisions "upon the construction of the statute of limitations are "not controlling in this state."

The case of

Brunswick Terminal Co. vs. Bank, 99 Fed., 635,

decided by the Circuit Court of Appeals for the Fourth Circuit, is in apparent conflict with the decision last above referred to. This was an action brought in the United States Circuit Court for the District of Maryland to enforce a stock-

holders' liability arising under a statute of the State of Georgia. The liability seems to have been created by the charter of the Brunswick State Bank, incorporated by an act of the Georgia Legislature of October 24, 1881. A statute of that state apparently altogether distinct from the act creating the bank, provided as follows:

> "All suits for the enforcement of rights accruing to "individuals under statutes, acts of incorporation or by "operation of law, shall be brought within twenty years "after the right of action accrues."

It was held that the action might be maintained in Maryland within the time prescribed by the Georgia statute, notwithstanding that by the Maryland statute the action would have been barred within three years.

The decision was made to turn upon the fact that the limitation statute, limiting suits for the enforcement of rights "accruing under acts of incorporation" was in existence at the time of and previous to the passage of the act of incorporation of the Brunswick Bank, the Court holding that it must be, therefore, read into such act of incorporation. The Court said with reference to the same:

> "The statute of limitations of the State of Georgia "sought to be applied was not in its broader sense the "general statute of limitation of the state as distinguished "from the statutes contained in the particular enactment; "but it was the special statute of limitations of that state "applicable to statutory liabilities or liabilities arising "under acts of incorporation, or by operation of law, in "*existence at the time and for years previous to the pas-*"*sage of the act of incorporation of the Brunswick Bank,* "*and, therefore, must be considered as forming a part of,* '*as read into, the act incorporating the bank, as much so* "*as if it had been formally incorporated therein, and the* "*stockholders and all persons dealing with this bank are* "*presumed to know of its existence, and are bound by its* "*terms.*"

It is to be noted that Judge Brawley dissented.

Another instructive case arising under the same statute

that was construed in the case of Whitman vs. Citizens' Bank, is

Pulsifer vs. Greene, 52 At., 921.

The action was brought in the State of Maine upon a liability arising under the constitution and laws of the State of Kansas. The statute of the last named state provided that "an action upon a liability created by statute, other than a forfeiture or penalty" must be begun within three years, and it is claimed that this period having elapsed the action could not be maintained in the State of Maine. The Court was guided in its action by the following clear statement of the governing principles from Minor on Conflict of Laws, Section 210:

> "If the state statute that creates the remedy pre-
> "scribes the time within which the action thereon must
> "be brought, it is generally construed as imposing that
> "period for the prosecution of the remedy as a condition
> "for prosecuting it at all. It becomes a part of the right
> "itself, and is governed by the same law that regulates
> "the right in other respects. But if the period of limita-
> "tion is not prescribed by the same statute which confers
> "the right, but is found in a general statute, the general
> "principle applies, and it becomes a law relating to the
> "remedy, which will have no extra territorial force."

The Court then said:

> "In this case paragraph 1192, which creates the lia-
> "bility of the defendant, prescribes no period within
> "which that liability must be enforced. The statute re-
> "lied upon by the defendant is a part of the general stat-
> "ute of limitations of the State of Kansas. It applies to
> "all contracts not in writing, and to all liabilities cre-
> "ated by statute, other than a forfeiture or penalty. Bank
> "vs. Baker, 176 Mass., 294, 57 N. E., 603. It is not there-
> "fore an integral part of the right itself, which goes with
> "it everywhere that the right is sought to be enforced,
> "but it applies only when the remedy is sought in Kan-
> "sas, and cannot follow the right beyond the bounds of
> "that state."

The Kansas statute was, of course, held inapplicable. The case of

The Harrisburg, 119 U. S., 199,

was distinguished on the ground pointed out in the discussion of that case above. The Supreme Court of Massachusetts had reached the same conclusion in the case of

Broadway Nat'l. Bank vs. Baker, 176 Mass., 294,

referred to in the quotation above. The opinion in that case says, with reference to the point in contention there:

"The statute of limitations in Kansas is of general "application. In the statute on which the plaintiff's "rights arise there is no limitation of the right founded "on a requirement that the right be enforced within a spe-"cified period of time."

That case further held that inasmuch as the defendants had not been in the State of Kansas since the cause of action accrued, the action was not barred by the statute of that state, and even if held applicable the action could be maintained in Massachusetts under the circumstances.

Of what character now is this Montana statute which opposing counsel argue must be held to bar this action begun in Connecticut. It reads as follows:

"Sec. 554. This title does not affect actions against "directors or stockholders of a corporation, to recover a "penalty or forfeiture imposed, or to enforce a liability "created by law; but such actions must be brought within "three years after the discovery by the aggrieved party "of the facts upon which the penalty of forfeiture attached "or the liability created."

It is part of a Title entitled: "The Time of Commencing Actions," which is a part of an act of the legislature of the State of Montana entitled: "An Act to Establish a Code of Civil Procedure," aproved by the Governor of said State on the 14th day of February, 1895. (See memorandum at close of act.)

The section quoted appeared for the first time in the laws of Montana in this enactment. The laws previously in force contained no section in anywise similar.

It will thus be seen that this entirely new section came into existence at a date more than two years subsequent to the time of the accrual of the cause of action here sued upon.

At the time the cause of action matured the liability section existed as Section 460 of Fifth Division of Compiled Statutes of Montana of 1887.

The section reads:

"Every such company shall, annually, within twenty "days from the first day of September, make report, which "shall be published in some newspaper published in the "town, city or village, or if there be no paper published "in said town, city or village, then in some newspaper "published nearest the place where the business of the "said company is carried on, which shall state the amount "of capital and of the proportion actually paid in and "the amount of existing debts, which report shall be "signed by the president and a majority of the trustees, "and shall be verified by oath of the president or secre- "tary of the said company, and filed in the office of the "clerk of the county where the business of said company "shall be caried on, and if any of said company shall fail "to do so, all the trustees of the company shall be jointly "and severally liable for all debts of the company then "existing, and for all that shall be contracted before such "report shall be made. No liability shall attach to any "trustee, or board of trustees, by virtue of the provisions "of this section for a failure to be caused to be published "in a newspaper the report in this section mentioned, if "within the time herein mentioned, said trustee, or board "of trustees, or company shall annually cause said report "to be filed in the office of the county clerk and recorder "of the county in which the business of the said company "is carried on, as declared in its certificate of incorpora- "tion."

The volume referred to consists merely of a compilation of laws theretofore enacted and then in force as will appear by numerous annotations throughout the volume. All of Chapter XXV., which includes Section 460 quoted, comprises an act (with certain slight amendments which appear in the annotations) passed by the first legislature of the Territory of Montana, for the organization of corporations, approved January 12, 1872, as will be seen by a notation at page 462 of the Revised Statutes of 1879. This chapter did not, at the time this cause of action matured, contain any provision in any

way affecting or limiting the time of the commencement of any action. The act indeed which embraces Section 460 had never at any time contained any such provision. The limitation statutes, all of which were general in the broadest sense of the term, had always existed as part of an entirely separate and distinct act passed February 16, 1877.

The liability section (Section 460, Fifth Division Compiled Statutes) was re-enacted in substantially the same form by an act (in which it appears as Section 451) entitled: "An Act to Establish a Civil Code," approved February 19, 1895, which act provides in Section 4653 thereof:

> "The provisions of this Code, so far as they are sub-
> "stantially the same as existing statutes, or the common
> "law, must be construed as continuations thereof, and not
> "as new enactments."

It will thus be seen that the limitation statute was never at any time a part of the act creating the liability; that it came into existence several years after the liability had accrued and fully matured, and that it was then enacted as a part of an act entirely separate and distinct from the re-enactment of the liability statute.

The entire basis of argument that the limitation prescribed by this section is available to the defendant sued in Connecticut is that it inheres in the right, or that it forms a condition upon which the right is granted. But it must be clear that if it is a condition upon which the right is granted, then it must, according to the rule in Boyd vs. Clark, supra, form a part of the act granting the right. If it had been enacted as a proviso to the act granting the right, or had even been a part of such act, limiting the time within which liabilities arising under the act could be enforced, then it would have been a "special" limitation, as that term is used in the cases cited, and the argument that it formed a part of the right would not have been without foundation.

If it had been in existence, though as a distinct act, prior to the enactment of the liability statute, as was the case in Brunswick Terminal Co. vs. Bank, supra, then counsel might have argued, using the language of the court in that case that

"it must be considered as forming a part of, as read into, the act" creating the liability.

Since, however, it was never at any time a part of the act creating the liability, and was not in existence when the liability statute was enacted, but was a subsequent enactment, appearing long after the accrual of the cause of action sued upon, the assertion that it forms a part of the right plainly appears to be unsupported either by reason or authority.

Another reason why section 55 of the Code of Civil Procedure of Montana is not available to the defendant as a defense is found in the provisions of Section 541 of the same code, which is a reenactment of Section 50 of the Compiled Statutes of 1887.

This section reads:

> "If, when the cause of action accrues against a per-
> "he is out of the State, the action may be commenced
> "within the term herein limited, after his return to the
> "State, and if, after the cause of action accrues, he de-
> "parts from the State, the time of his absence is not part
> "of the time limited for the commencement of the action."

The defendant was never in the State of Montana at any time subsequent to 1890.

Cert. p. 4, ll., 3-4.

If section 554 is an essential part of the liability sought to be enforced, so also is Section 541 an essential part of such liability. In other words, if Title II. of the Code of Civil Procedure of Montana, entitled: "Time of Commencing Actions" is to be considered applicable at all to this action begun in Connecticut, every section embraced in that Title, which has any bearing upon the inquiry is equally applicable with every other section.

If the cause of action is not barred in the State of Montana, by reason of the provisions of Section 541, then the right is not extinguished, and it may be enforced anywhere.

It is not extinguished, and cannot be extinguished in Montana by reason of the provisions of Section 541.

In

Broadway Nat'l. Bank vs. Baker, 57 N. E., 603,

an action was brought in the State of Massachusetts upon the Kansas statute above repeatedly referred to. It was held that though the Kansas statute should be considered as applying to the case, the action was not barred by reason of the fact that the Kansas statute of limitations appealed to was a provision of the general statutes of limitation of that state, by which it was further provided that the time during which a defendant was absent from the state was barred, it appearing the defendants had not been in Kansas since the cause of action accrued.

Of course, Section 541, under the uniform rulings of the courts, applies equally to persons who have once been in the state, and to those who have never been, notwithstanding the use of the word "return" in the statute.

Hanchett vs. Blair, 100 Fed., 817.

Olcott vs. Tioga, 20 N. Y., 210.

Tioga vs. Blossburg, 20 Wall., 137.

Hatch vs. Spofford, 24 Conn., 432.

In the last case cited, the Court said, with reference to a statute similar in terms, that it is applicable when the cause of action arises in another state within which both parties then resided, and so continued to reside until after the action was brought, and, after citing a large number of cases so holding, declared:

> "The question at issue has been again and again de-
> "cided in this country and abroad, and at this day the
> "law of the case arises on judicial authority of the high-
> "est and most decisive character."

It is argued, however, that absence from the state does not prevent the running of the limitation prescribed by Section 554, because that section provides: "This title does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed or to enforce a liability created by law," and Section 541 of the present code is one of the sections of the same Title, as is Section 554. But no such construction can fairly be given to Section 554.

It may be true, that giving the language a strict and literal rendition, the conclusion would follow. But observing the cardinal rule of the construction of statutes, namely, that the intention of the legislature is to control, no other conclusion can be reached than that this section merely means that the time fixed by that title will not be deemed to apply to actions of the character named in Section 554. The word "but" in introducing the remainder of the section as follows: "But such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached, or the liability created," points clearly to this construction.

In the Title embracing Section 554, being Title II., entitled: "Time of Commencing Actions," are found many provisions which it cannot be for a moment contemplated the legislature intended should not apply to actions such as are designated in Section 554. For instance, it is provided in the same title, Section 540, that "an action is commenced within the meaning of this Title when the complaint is filed." Was it intended that the legislature should establish one rule with reference to the time when all actions, save those enumerated in Section 554, should be deemed to have been commenced, and another rule with reference to such actions? Section 542 provides that the statute shall be tolled during the minority of the defendant, or his insanity, or while he is imprisoned on a criminal charge for a term less than life. Section 543 makes provision as to the time when the action may be commenced by the representative of a plaintiff, if he die before commencing the action, and the time within which an action may be brought against his representatives, if one dies leaving a cause of action against himself. Section 546 provides for the tolling of the statute during the time of war; Section 548 during the time when the action is stayed by injunction or other order of court. Section 555 provides for the interruption of the running of the statute by an acknowledgment or new promise. Section 558 provides that the objection that the action was not commenced within the time limited can be taken only by answer.

None of these provisions are applicable to actions designated in Section 554, if the construction sought to be given to it by opposing counsel is correct, and there are other provisions not enumerated above, but which will be found in the statute, that are equally inapplicable and yet it cannot be conceived that the legislature intended they should not be applicable.

But if the argument is followed to its logical conclusion, even Section 554 has no application to actions of that character, because Section 554 is a part of Title II., and if Title II. does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, then Section 554, being a part of Title II., does not affect actions of that character. The argument is thus reduced to an adsurdity and cannot obtain. A construction which makes a statute an absurdity or insensible is to be avoided.

> "Statutes should be contrued with a view to the orig-
> "inal intent and meaning of the makers, and such con-
> "struction should be put upon them as best to answer that
> "intention, which may be collected from the cause or
> "necessity of making the act, or from foreign circum-
> "stances, and, when discovered, ought to be followed, al-
> "though such construction may seem to be contrary to
> "the letter of the statute." Johnson vs. Heald, 33 Md., 352.
>
> Hooper vs. Creager, 35 L. R. A., 202.

But even though the contention of counsel as to the construction of Section 554 were to be held correct, it would not bar this action. The only possible ground upon which the Montana statute can be held to be applicable at all is that with reference to the particular liability sought to be enforced, it does not affect the remedy only, but inheres in the right, or is an incident of the right, or is incident to the right, or is a condition of the right. If it affects the remedy only, it is elementary that it cannot be considered in a foreign jur-

isdiction. Now, if it affects the right it is clear that it cannot, under any circumstances, affect this action, because the act containing Section 554 further provides (Section 3455 Code of Civil Procedure of Montana) as follows:

"No action or proceeding commenced before this "Code takes effect, and no right accrued, is affected by its "provisions."

As plaintiff's right here sued upon had accrued September 22, 1893, Section 554 passed in 1895, cannot affect such right, because the same enactment provides in another section that it shall not do so.

But Section 3455 may be omitted from consideration altogether and the result will be the same, because if it had been the manifest intention of the legislature to impose the condition upon the right to maintain the action, that suit be instituted within a certain time after the cause of action accrued, it would have been powerless, since this cause of action had then already accrued, to have done so because of the 14th Amendment of the Constitution. Legislation of that character would deprive the party in whose favor the right had accrued of his property without due process of law, in case his rights were injuriously affected.

If the limitation is of such a character as that it travels with the right and is enforcible beyond the jurisdiction of the state, a part of whose law it is, in the language of Professor Minor, quoted above, it becomes a part of the right itself, *and is governed by the same law that regulates the right in other respects.*

Satutes lengthening or shortening the periods prescribed for the commencement of actions by existing statutes of limitations are and, since the commencement of the history of constitutional law, have been held to be valid because, as it is now held, such statutes affect the remedy only and not the right.

If it is but once established that any particular statute limiting the time within which an action may be commenced is a part or an incident of the right and does not affect the

remedy merely, it must be conceded that that statute cannot be changed so as to affect existing causes of actions, for the very ground work of the rule that statutes of limitations may be changed so as to affect existing causes of action is gone.

It is a little difficult to understand how a statute passed in 1895 could be a part of or incident to, or a condition of a right which accrued in the year 1893. If it became a part of the right then the legislature changed the rights of the parties, an act confessedly beyond its power, except in respect to rights of a peculiar character, presently to be noticed.

The principle here contended for was applied in the case of

Theroux vs. N. P. Ry., 64 Fed., 84,

above referred to. The statute under consideration was the old Montana statute giving an action for wrongful death, which provided in the very act conferring the right that the action to enforce it should be commenced within three years. The Minnesota statute to recover for wrongful death in Minnesota likewise contained in the very act itself a provision that the action to enforce the liability should be commenced within two years. It was contended that the action was barred by the Minnesota statute. The Circuit Court of Appeals for the Eighth Circuit, said:

> "To refuse to entertain such a suit within three years "would be to subtract from the liability, and to impair "the right intended to be conferred by the laws of Mon- "tana; for the period allowed within which to enforce "the liability, as we have before shown, is a substantial "part of the liability imposed and of the right intended to "be created."

In the opinion it had theretofore been said:

> "It must be accepted, therefore, as the established "doctrine, that where a statute confers a new right, which "by the terms of the act is enforcible by suit only within "a given period, the period allowed for its enforcement "is a constituent part of the liability intended to be "created. The period prescribed for bringing suit in such "cases is not like an ordinary statute of limitations, "which merely affects the remedy. It follows, of course, "that, if the Courts of another state refuse to permit the

"cause of action to be sued upon during a part of th
"period limited by the foreign law, to that extent the
"refuse to give effect to the foreign law, and by so doin
"impair the right intended to be created."

If the Montana statutes of limitations constituted a part of the right, then at any time prior to the first of July, 1895, the plaintiff and his assignors, had the right to recover of the defendant the sums mentioned in the complaint at any time until the defendant should have come and remained within the state of Montana one year.

By the act of 1895, this right was taken away, and they were given, instead, a right to recover at any time within three years after they discovered the facts upon which the liability came into existence, assuming the construction of Section 554 contended for by our opponent to be correct.

As a matter of course, if the legislature of Montana can change the rights of the parties, either increase or dimish them, they can take those rights away and destroy them altogether. But the law does not permit this.

"Rights accrued and vested under a statute cannot
"be divested by a repeal or modification thereof."
Benson vs. Mayer, 10 Barb., 223-244.

In

Kavanaugh vs. Board of Police Commissioners, 66 Pac., 36,

the plaintiff brought an action to recover the sum of one thousand dollars claimed to be due as the widow of a fireman, under a statute which awarded to persons occupying her postion a pension in the amount sued for in case her deceased husband had served as a fireman for more than twenty years. Before she obtained judgment the statute was repealed, but it was held that it could not affect her right of action which had accrued before the repeal. To the same effect is

Kay vs. Railroad Co., 65 Pa. St., 269.
See Wade, on Retro-Active Laws, 143-172-194.

It is true that where a statute gives a right of action for a penalty in the strict sense of the term (no cause of action

existing against any one in favor of the plaintiff, except by virtue of the statute giving the penalty), no recovery can be had if the statute is repealed before judgment.

This involves a consideration of the subject of penalties. The matter received some consideration from this Court in

Huntington vs. Attrill, 146 U. S., 657.

That was a suit in equity brought in the Circuit Court of Baltimore by the plaintiff to subject certain property to the satisfaction of a judgment recovered in a Court of the State of New York. The bill alleged not only such judgment, but the original liability arising under the provisions of Sec. 21 Statute of New York of 1875, C. 611. The original cause of action, therefore, upon which that judgment was recovered was identical with that which is the foundation of the present action, with the exception that the liability in that case arose under the provision making the directors of the corporation liable for the debts of the company, in case the report required to be filed was false in any material respect, while in the present action, the liability arises under the provision which makes the directors so liable in the event of a failure to file the report. It is plain that the two actions cannot be distinguished upon that ground.

In that case the defendant made the objection that the suit could not be maintained in Maryland, inasmuch as the liability, which was the foundation of the judgment recovered in New York, was in the nature of a penalty arising under a statute of the State of New York, and which penalty could not be enforced beyond the territorial limits of the State of New York. This objection was overruled in the trial Court, but its decision was reversed by the Appellate Court and the suit was brought into this Court on writ of error to review such decision. This Court there determined that the nature of the original liability was not changed by recovering judgment upon it.

The language of the Court upon the question was:

"The essential nature and foundation of a cause of ac-
"tion, indeed, are not changed by recovering judgment
"upon it."

The Court then proceeded to consider the character of the original cause of action and holding that it was not for the recovery of a penalty in the strict and international sense, reversed the judgment of the Court of Appeals of the State of Maryland.

The question as to whether the legislature of the state had the right to repeal such statutes so as to affect existing causes of action was left undetermined by the Court, but it referred to the case of

Hawthorne vs. Calef, 2 Wall., 10-23,

as possibly holding that it had not.

A case perhaps more nearly in point is

Steamship vs. Joliffe, 2 Wall., 450.

A statute of California imposed upon a vessel declining the services of a pilot half fees. The act was subsequently repealed, but a pilot who had become entitled to fees under it was permitted to recover. The Court says:

> "The transaction between the pilot and the master "or owners cannot be strictly termed a contract, but it is "a transaction to which the law attaches similar conse- "quences; it is a quasi contract. Resting upon transac- "tions regarded by the law as a quasi contract, there is "no just ground for the position that it fell with the re- "peal of the statute under which the transaction was had. "When a right has arisen upon a contract or a transac- "tion in the nature of a contract authorized by statute "and has been so far perfected that nothing remains to "be done by the party asserting it, the repeal of the stat- "ute does not affect it, or an action for its enforcement. "It has become a vested right which stands independent "of the statute."

It may be observed that this decision was rendered before the adoption of the 14th Amendment and rests upon the contract clause of the Constitution. It would have been plainly justifiable under the Amendment had it been in existence. Its scope is manifestly broader than that of the contract clause of the Constitution.

It unquestionably protects causes of action accrued to a widow for the negligent death of her husband given by a

statute after repeal, though such right partakes of none of the elements of a contract.

Tiffany on Death by Wrongful Act, 31.

Osborne vs. City, 32 Fed., 36.

We venture to say that every right of action, not penal in the strict sense—that is, in the sense of a prosecution for the punishment of a crime, a public wrong, is saved by the amendment against adverse legislation by a state.

The question under consideration was before the Court in

Tinker vs. Van Dyke, 1 Flip., 521;

Fed. Case, 14058.

The old bankrupt act avoided a preference given to a creditor having reasonable cause to believe the bankrupt insolvent. This was amended in 1874, so as to leave the conveyance valid, unless the creditor knew the bankrupt to be insolvent. It was held that the old statute remained applicable to causes of action arising after its passage and prior to the amendment. The argument was made that the liability created by the original act was in the nature of a penalty which could be taken away or changed at the will of Congress, and as a foundation for the argument reference was made to cases such as Halsey vs. McLean, 12 Allen, 438, holding that laws which imposed liabilities upon the officers and shareholders of corporations for the non-performance of some duty, being penal in their character, will not be enforced in foreign jurisdictions. It was argued, and with sound reason, that if the law is penal in the sense that it cannot be enforced in a foreign jurisdiction, it is penal in the sense that it is subject to repeal. The Court said:

> "A law which created a liability between citizen and "citizen, as further security for the contracts of a cor- "poration of which the obligated person is a member, has "in it no penal element whatever in that sense which "makes one Court refuse to enforce the penalties of for- "eign governments."

> "All those provisions of law intended to secure the "performance of private contracts, and in which the prop-

"erty rights of private citizens alone were concerned, "should never have been deemed penal statutes within "the rule excluding jurisdiction."

"A very large percentage of all the commerce, man- "ufacture and trading of the country is coming to be done "by state corporations; the citizen relies in large degree "upon the security afforded by those obligations imposed "upon officers and shareholders for an omission of their "duty. To call this obligation a penalty is to exclude the "jurisdiction of the Federal Court by a mere name. We "can see no distinction in principle between a state stat- "ute which should repeal a provision in a railroad or bank "charter, rendering liable directors and shareholders if "they incurred debts beyond the amount of the capital "paid in, or failed to make proper scrutiny and publicity "of the accounts of their corporation, and a law divest- "ing such a liability, unanimously held to be unconstitu- "tional in Hawthorne vs. Calef, supra."

And then, touching the right of the legislature to amend or repeal acts of the character of the law creating the liability in this case, the Court added:

"The rule so frequently quoted in the books that "what is created by statute may be taken away by stat- "ute was largely relied upon at the bar. We remarked "during the argument, and now repeat, there never was "any such rule administered anywhere.

"When remedies are created, penalties enacted, "crimes defined and punished, political regulations, es- "tablished by statute, they may be abrogated by their "repeal.

"When repealed, the presumption is in favor of a "retro-active application. It is a misdescription of the prin- "ciple involved in these classes of cases to say the right "of action is gone because they are statutory.

"They are gone on account of the nature of the stat- "ute, the right regulated, and the persons to be affected; "because, in these peculiar instances, and other analogous "cases, statutory rights are abrogated by repeal of the law "it by no means follows that all other statutory rights of "a different character, creating substantial property "rights, upon which business transactions between citi- "zen and citizen are vested, fall under the same circum- "stances."

If the privilege which the plaintiff, or his assignors, enjoyed at the time the right of action accrued, to bring and maintain their action against the defendants at any time within one year from the time the defendants came into the State of Montana, was a part of the right granted them by the statute, and inhered in the right, or was an incident of the right, and was not a mere regulation concerning the remedy which would be afforded in the Courts of Montana for the enforcement of the right, such right, so granted, with all its incidents, was not only protected from adverse legislation by the 14th Amendment to the Constitution of the United States, but by the express and direct provisions of the Constitution of the State of Montana, providing that the legislative assembly should pass no law for the benefit of a railroad or other corporation, or an individual, or association of individuals, retrospective in its operation.

Const. of Montana, Art. XV., Sec. 13.

The two rules of law are cognate, that the legislature may repeal laws imposing "penalties," and there being no saving clause that all rights of action for past infractions is gone, and that "penalties" are enforced only by the Courts of the state imposing them. The two principles are founded on the same basis and refer to the same kind of "penalties." For illustration of the kind of penalties which cannot be enforced on repeal of the law imposing them, see

Myer on Vested Rights, 35.

It is clear that, applying settled principles of the law, concerning which there is practical unanimity in the decisions, to the facts presented by this certificate, it must be held that Section 554 of the Montana statutes of limitations is inapplicable, that it does not bar this action if it is applicable, and that the question certified should accordingly be answered in the negative.

Respectfully submitted,

T. J. WALSH and

JOHN A. SHELTON,

Counsel for Andrew J. Davis.

ANDREW J. DAVIS

vs.

HIRAM R. MILLS AND CLARENCE C. FROST

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otion on behalf of Hiram R. Mills, sole surviving
defendant in the above entitled action, for the
certification of the entire record therein
to this Court.

21676

Supreme Court of the United States,

October Term, 1903,

No. 235.

ANDREW J. DAVIS

vs.

HIRAM R. MILLS and CLARENCE C. FROST.

Motion on behalf of Hiram R. Mills, sole surviving defendant in the above-entitled action, for the certification of the entire record therein to this court.

To the Honorable the Supreme Court of the United States:

Comes now Hiram R. Mills, sole surviving defendant in the above-entitled cause, and moves the court as follows:

For an order requiring the whole record and cause in the above-entitled action to be sent up by the Circuit Court of Appeals to this court for its consideration.

This motion is based on the record, a certified copy of which is herewith submitted, and on the statement hereto attached of the questions arising upon the record.

WM. WALDO HYDE,
Solicitor for Hiram R. Mills, sole surviving defendant.

STATEMENT.

In the above-entitled cause a question of law concerning which the Circuit Court of Appeals for the Second Circuit desires instruction of this court has been certified to this court in accordance with the provisions of Section 6 of the Act of March 31, 1891, establishing courts of appeal, etc., as will appear from the record, No. 235 of the October term, 1903, of this court.

This cause is an action at law which was commenced in the Circuit Court of the United States for the District of Connecticut by Andrew J. Davis, plaintiff, against Hiram R. Mills and C. C. Frost, defendants, by writ and declaration wherein the following facts were alleged:

(*a*) That on and prior to the 1st day of September, A.D. 1890, the defendants and others were trustees of the Obelisk Mining and Concentrating Company, a corporation organized under the laws of the state of Montana and located at Butte City, in said state, and that the defendants then were and at all times since have been residents and citizens of the state of Connecticut and non-residents of said state of Montana.

(*b*) That said corporation filed a report as required by the statute of the state of Montana on the 20th day of September, 1890, and on the 1st day of September, A.D. 1892, signed by its president and a majority of the trustees of said company and verified by the oath of the president and secretary of said company stating the amount of its capital, the proportion actually paid in, and the amount of its existing debts, but that said corporation failed to file such

annual report of its affairs as required by said statute in September of the years 1891 and 1893.

(*c*) That on the 31st day of May, A.D. 1892, the said Obelisk Mining and Concentrating Company gave its note at sixty days without grace to the State Savings Bank of Butte City, Montana, for $1,000, which note was not paid at maturity, and that on or about the 24th day of June, 1897, said State Savings Bank of Butte City, Montana, transferred and assigned and indorsed said note to the plaintiff, A. J. Davis.

(*d*) That on and prior to the 27th day of April, A.D. 1892, F. E. Miller and Charles A. Chapman, copartners in business at said Butte City, Montana, claimed to have sold and delivered to the said Obelisk Mining and Concentrating Company certain goods of the value of $1,319.07, and that on or about the 8th day of November, 1893, said Miller and Chapman assigned all their property, including the above described account, to Adam F. Brown in trust for the purpose of paying all the debts of said F. E. Miller and Charles A. Chapman, and that on or about the 21st day of September, 1895, the said Adam F. Brown, as such assignee of the said Miller and Chapman, obtained judgment against the said Obelisk Mining and Concentrating Company on account of said indebtedness for the sum of $1,365.53, and that on or about the 24th day of June, A.D. 1897, the said Brown, as such trustee, transferred and assigned said claim under said judgment to the plaintiff, A. J. Davis.

(*e*) That the Butte Hardware Company, a corporation organized and existing under and by virtue of the laws of the state of Montana, at sundry times between the 5th day of January, 1892, and the 12th day of December, 1892, sold and delivered to the said Obelisk Mining and Concentrating Company goods,

wares, and merchandise of the value of $1,968.96, which claim by payments thereon was subsequently reduced to $1,071.36, and that on or about the 24th day of June, 1897, said Butte Hardware Company assigned said claim to the plaintiff, said A. J. Davis.

(*f*) That neither of the said debts nor any part thereof have ever been paid, and that the said Obelisk Mining and Concentrating Company was wholly insolvent and had no property out of which the said indebtedness could be paid.

(*g*) That Section 460 of Chapter 25 of the fifth division of the compiled statutes of the state of Montana provided as follows:

> "Every such company shall, annually, within twenty days from the first day of September, make report, which shall be published in some newspaper published in the town, city, or village, or if there be no newspaper published in said town, city, or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital and of the proportion actually paid in and the amount of existing debts, which report shall be signed by the president and majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on, and if any of said company shall fail to do so, all the trustees of the company shall be jointly and severally liable for all debts of the company then existing, and for all that shall be contracted before such report shall be made. No liability shall attach to any trustee or board of trustees by virtue of the provisions of this section for a failure to cause to be published in a newspaper the report in this section mentioned, if within the time herein mentioned, said trustee, or board of trustees, or company shall annually cause said report to be filed in the office of the county clerk and recorder of the county in which the business of the said company is carried on, as declared in its certificate of incorporation."

(*h*) That the said Obelisk Mining and Concentrating Company having failed to make the report required by said section of the statutes of Montana, the defendants were jointly and severally liable for the above described indebtedness of said corporation.

Said action was commenced by service upon the defendants on June 30, 1897, and the declaration then contained two counts, one based upon the aforesaid note to the State Savings Bank of Butte City of $1,000, dated May 31, 1892, due July 31, 1892, and the second count based upon said claim of Miller and Chapman for goods sold and delivered prior to April 27, 1892, amounting, less payments thereon, to $1,365.53.

On October 18, 1897, by an amendment a third count was added to said declaration based upon said claim of the Butte Hardware Company for goods sold and delivered between January 5, 1892, and December 12, 1892, amounting, less payments, to $1,071.36.

The defendants objected to the combining of the three causes of action, neither one of which was of sufficient amount to give jurisdiction to the United States Circuit Court, on the ground that the statute of Montana on which said suit was brought was penal and that each cause of action was separate and distinct in nature, and that under the rules and practice of the Connecticut courts it was improper to join them for the purpose of raising the amount in question to the limit required by the statute of the United States to give jurisdiction to the United States Circuit Court.

Judge Shipman in the United States Circuit Court for the District of Connecticut overruled this objection, 83 Fed. Rep., 982, basing his decision upon the language of the opinion of Judge Gray in the case of Huntington *versus* Attrill, 146 U. S., 657, and allowed the plaintiffs to combine the three causes of action.

The defendants then filed a plea to the jurisdiction of the United States Circuit Court upon the ground that the statute of Montana upon which this action was based was penal in its character and could not be enforced outside the limits of the state of Montana.

Judge Townsend of the United States Circuit Court for the District of Connecticut held said plea not good, 99 Fed. Rep., 39, basing his opinion upon the language of the case of Huntington *vs.* Attrill above referred to.

The defendants then demurred to the complaint upon the ground that the cause of action therein set forth was barred by the statute of limitations both of the state of Montana and of the state of Connecticut.

The plaintiff in his brief and on his argument claimed that under the wording of the opinion in the case of Huntington *vs.* Attrill above cited the statute in question was not penal.

The plaintiff further claimed that if penal the action did not come within the intent of the section of the statute of the state of Connecticut governing actions for a forfeiture or penalty, being Section

1120 of the General Statutes of Connecticut, revision of 1902, reading as follows:

> "No suit for any forfeiture upon any penal statute shall be brought but within one year next after the commission of the offense."

The defendants claimed on the hearing before Judge Townsend that this Honorable Court in its decision as rendered by Judge Gray in Huntington *vs.* Attrill, *supra,* did not intend or mean that a statute of the character of the Montana statute upon which this action was based was not penal in so far as the application of the statute of limitations was concerned.

The defendant contended that the Montana statute, except as it is construed to be *penal,* is unconstitutional in that it goes the full length of providing that the debt of a corporation shall become the debt of an individual and a stranger solely because of failure to perform a subsequent act, and that except as it is construed to be a measure of a *penalty* for failure to conform to a public requirement such statutory enactment is invalid because unconstitutional.

The statute provides that upon the failure to file the required reports the trustees shall be personally liable "*for all debts of the corporation* THEN EXISTING," as well as for all thereafter contracted.

As to such debts as are contracted *after* the failure to conform to the requirements of the corporation law, it may be claimed that the corporate exemption from liability is to that extent removed; that the trustees contract knowing that the exemption is

so removed and so bind themselves and voluntarily offer to the creditor the additional remedy of their own personal obligation.

No such reasoning, however, is applicable to the case of corporate debts contracted *before* failure to conform to the statutory requirement.

In such case no theory is apparent which can defend the validity of the statute except that it is penal.

The defendants therefore contend that this question has not been reached by this court, either in the case of Huntington *vs.* Attrill or in any other reported decision.

An entirely distinct question is presented when, as in Huntington *vs.* Attrill, a judgment has been secured upon the statute in the home state which is sought to be enforced in a foreign state.

The defendants further claimed that the highest court of the state of Montana in the case of Bank *versus* Johnson, 18th Montana, 440, had held the statute of Montana creating the cause of action upon which this suit is based to be penal, in so far as the application of the statute of limitations was concerned.

The defendants also claimed that the statute of the state of Connecticut above quoted concerning limitations of suits for forfeiture under penal statutes governed the court in this case.

Judge Townsend, whose opinion is reported in 113 Fed. Rep., 678, sustained the defendant's de-

murrer to the complaint, whereupon the plaintiff by writ of error removed the case to the Circuit Court of Appeals for the Second Circuit, where the questions raised by the demurrer were again argued before Judges Wallace, Lacombe, and Cox.

In each of these presentations of the case the scope, meaning, and intent of the opinion in the case of Huntington *vs.* Attrill and of conflicting decisions in other courts more or less dependent thereon were presented and discussed on one side and the other.

The questions raised upon the argument of the demurrer, in addition to those certified to this court, were:

1st. Is the statute of the state of Montana under which this suit is brought penal in so far as the application of the statute of limitations is concerned?

2d. The statute of Montana in question having been held by the Supreme Court of that state to be penal in so far as the application of the statute of limitations is concerned, is not the decision of that court final and binding everywhere?

3d. Does the re-enactment of the old statute of Montana in substantially the same form in the new statute carry with and into it the judicial construction which the former statute had received in the highest court of the state?

The statute of Montana in force at the time when the rights of action upon which this suit is brought

accrued was Section 45 of the Compiled Statutes of Montana, which reads as follows:

> "(1.) In an action for a penalty or forfeiture, when the action is given to an individual, or to an individual and the territory except where the statute imposing it prescribes a different limitation" . . . "shall be commenced within one year."

This statute was construed by the Supreme Court of Montana in the case of Bank *vs.* Johnson, 18 Montana, 440, as being penal in so far as the application of the statute of limitations was concerned.

After the rights of action upon which these suits were brought accrued, but before suit was brought, Section 45 above cited was repealed by the Code of Civil Procedure, and the following section was substituted:

> "Sec. 515. Within two years:
> "1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

Section 45 of the Compiled Statutes having been construed by the Supreme Court of Montana to be penal in so far as the application of the statute of limitations was concerned, the defendants claimed that by re-enacting that statute in Section 515 of the Civil Code in substantially the same language the legislature carried into that statute the judicial construction which the former statute had received.

4th. Is the action barred by the statute of limitations of Connecticut above quoted, being Section 1120 of the General Statutes, revision of 1902?

The defendants claimed, and Judge Townsend sustained their contention, 113 Fed. Rep., 678, that the action was barred by the statute of limitations of the state of Connecticut, basing his decision upon the case of Mitchell *vs.* Hotchkiss, 48 Conn., 1, where the Supreme Court of the state of Connecticut held that the statute of the state of Connecticut which provides that in the case of every corporation a certificate showing its condition shall be filed annually by the president and secretary with the town clerk and that in case of neglect those officers shall be liable for all the debts of the corporation contracted during the period of such neglect is penal.

The Circuit Court of Appeals, however, apparently relying upon the case of Plum *vs.* Griffin, 74th Conn., 132, where the court held that a statute providing that any person who cut trees or timber on the land of another without his license should pay to the injured party two dollars for each and every tree of one foot in diameter, and for all trees of a greater diameter three times their value besides the two dollars, was not penal, overruled the decision of Judge Townsend upon this point.

5th. The main question considered by Judge Shipman, Judge Townsend, and by the Circuit Court of Appeals in this case was whether the decision in the case of Huntington *vs.* Attrill goes to the extent of deciding that a statute of the character of the Montana statute upon which this action is brought is not penal in so far as the application of the statute of limitations is concerned, notwithstanding the decision of the highest court of the state of Montana that it is penal in that respect.

The question submitted to this court by the justices of the Circuit Court of Appeals for the Second Circuit limits the discussion to the question as to whether or not Section 554 of the Civil Code of Montana applies to the action at bar.

Section 554 reads as follows:

> "Sec. 554. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability created."

The defendants submit that this question does not fully present the issue in such manner that your Honors can fairly pass upon the same.

In view of the contradictory decisions cited by the Circuit Court of Appeals for the Second Circuit in this case (see 121 Fed. Rep., 705), to wit: Hobbs *vs.* National Bank, 37 C. C. A., 513, 96 Fed. Rep., 396; same case on rehearing, 41 C. C. A., 205; 101 Fed. Rep., 77; Brunswick Terminal Co. *vs.* National Bank of Baltimore, 40 C. C. A., 22; 99 Fed. Rep., 635; Whitman *vs.* Citizens Bank, 49 C. C. A., 122; 110 Fed. Rep., 503; and the cases of Fitzgerald *vs.* Weidenbeck, 76 Fed. Rep., 695, and First Nat'l Bank of Butte *vs.* same, 97 Fed. Rep., 896, where the very statute of Montana in question in this suit was under discussion, the defendants submit that a full discussion of the entire question makes it necessary that the whole record and cause should be before this court.

The questions involved are of such character and importance and of such general interest, and are so

involved, and the courts are so divided in their opinion as to the proper application of the decision in the case of Huntington *vs.* Attrill to cases of this character, where no judgment is involved, that all said questions should be taken into consideration by your Honors and set at rest.

The defendant presents herewith and makes a part of this motion a certified copy of the transcript of record of this cause from the Circuit Court of Appeals for the Second Circuit.

WM. WALDO HYDE,
Solicitor for Hiram R. Mills, sole surviving defendant.

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JAMES H. McKENNEY,
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Supreme Court of the United States,

OCTOBER TERM, 1903.
OCTOBER TERM, 1903.

No. 235.

ANDREW J. DAVIS,
Plaintiff in Error,

vs.

HIRAM R. MILLS AND CLARENCE C. FROST,
Defendants in Error.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN BEHALF OF HIRAM R. MILLS, SOLE SURVIVING DEFENDANT IN ERROR.

WM. WALDO HYDE,
CHARLES E. PERKINS,
Counsel for Defendant in Error.

Supreme Court of the United States,

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STATEMENT.

A clear understanding of the exact points raised in this case by the question which has been certified to this court by the Circuit Court of Appeals for the Second Circuit requires a consideration of the following facts:

This cause is an action at law which was commenced in the Circuit Court of the United States for the District of Connecticut, by Andrew J. Davis of Montana, assignee, plaintiff, against Hiram R. Mills and C. C. Frost, both of Connecticut, defendants, by

writ and declaration wherein the following facts were alleged:

(*a*) That on and prior to the 1st day of September, A. D. 1890, the defendants and others were trustees of the Obelisk Mining & Concentrating Company, a corporation organized under the laws of the State of Montana and located at Butte City, in said state, and that the defendants then were and at all times since have been residents and citizens of the State of Connecticut and non-residents of said State of Montana.

(*b*) That said corporation filed a report as required by the statute of the State of Montana, on the 20th day of September, 1890, and on the 1st day of September, A. D. 1892, signed by its president and a majority of the trustees of said company and verified by the oath of the president and secretary of said company, stating the amount of its capital, the proportion actually paid in, and the amount of its existing debts, but that said corporation failed to file such annual report of its affairs as required by said statute in September of the years 1891 and 1893.

(*c*) That on the 31st day of May, A. D. 1892, the said Obelisk Mining & Concentrating Company gave its note, payable at sixty days without grace, to the State Savings Bank of Butte City, Montana, for $1,000, which note was not paid at maturity.

(*d*) That on and prior to the 27th day of April, A. D. 1892, F. E. Miller and Charles A. Chapman, copartners in business at said Butte City, Montana, claimed to have sold and delivered to the said Obelisk Mining & Concentrating Company certain goods of the value of $1,319.07, upon which $300 was paid by said Obelisk Mining & Concentrating Company July 1, 1892, and that on or about the 8th day of Novem-

ber, 1893, said Miller and Chapman assigned all their property, including the above described account, to Adam F. Brown in trust for the purpose of paying all the debts of said F. E. Miller and Charles A. Chapman, and that on or about the 21st day of September, 1895, the said Adam F. Brown, as such assignee of the said Miller and Chapman, obtained judgment against the said Obelisk Mining & Concentrating Company on account of said indebtedness for the sum of $1,365.53.

(*e*) That the Butte Hardware Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, at sundry times, between the 5th day of January, 1892, and the 12th day of December, 1892, sold and delivered to the said Obelisk Mining & Concentrating Company goods, wares, and merchandise of the value of $1,968.96, which claim by payments thereon was subsequently reduced to $1,071.36.

(*f*) That on the 24th day of June, 1897, said State Savings Bank, the said Brown, as such trustee, and the said Butte Hardware Company, respectively, assigned and transferred their said several claims to the plaintiff, said A. J. Davis.

(*g*) That neither of the said debts, nor any part thereof, has ever been paid, and that the said Obelisk Mining & Concentration Company was wholly insolvent and had no property out of which the said indebtedness could be paid.

(*h*) That Section 460 of Chapter 25 of the Fifth Division of the Compiled Statutes of the State of Montana provided as follows:

> " Every such company shall, annually, within twenty days from the first day of September, make report, which shall be published in some newspaper published in the

town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital and of the proportion actually paid in and the amount of existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on, and if any of said company shall fail to do so, all the trustees of the company shall be jointly and severally liable for all debts of the company then existing, and for all that shall be contracted before such report shall be made. No liability shall attach to any trustee, or board of trustees, by virtue of the provisions of this section, for a failure to cause to be published in a newspaper the report in this section mentioned, if within the time herein mentioned said trustee, or board of trustees, or company, shall annually cause said report to be filed in the office of the county clerk and recorder of the county in which the business of the said company is carried on, as declared in its certificate of incorporation."

(*i*) That, the said Obelisk Mining & Concentrating Company having failed to make the report required by said section of the statutes of Montana within twenty days of the 1st day of September, 1891, and within twenty days from the 1st day of September, 1893, the defendants were jointly and severally liable for the above-entitled indebtedness of said corporation.

Said action was commenced by service upon the defendants on June 30, 1897.

The declaration then contained two counts — the first count based upon the aforesaid note to the State Savings Bank of Butte City for $1,000, dated May 31, 1892, due July 31, 1892, and the second count based

upon said claim of Miller and Chapman for goods sold and delivered prior to July 1, 1892, amounting, less the payment made thereon, to $1,019.07, with interest and costs in addition thereto.

On October 18, 1897, by an amendment, a third count was added to said declaration based upon said claim of the Butte Hardware Company for goods sold and delivered between January 5, 1892, and December 12, 1892, amounting, less payments, to $1,071.36.

The indebtedness alleged in the first count of said complaint accrued, as against said corporation, July 31, 1892.

The indebtedness alleged in the second count of said complaint accrued, as against said corporation, prior to July 1, 1892.

The indebtedness alleged in the third count of said complaint accrued as against said corporation on or before December 12, 1892.

The liability of the trustees for said indebtedness because of failure to make return, as alleged in the complaint, accrued as follows:

As to the debts stated in the first and second counts, the liability of the trustees accrued upon the 31st day of July, 1892, and the 1st day of July, 1892, respectively, said trustees then being in default by reason of their failure to have made the reports required by the statute of the State of Montana to be filed within twenty days from the 1st day of September, 1891, to wit, on the 20th day of September, 1891.

As to the debt alleged in the third count, the trustees not being in default at the time when said debt accrued, their liability accrued, if ever, by reason of their failure to make the return required by the statute of the State of Montana within twenty days from the 1st day of September, 1893, to wit, on September 20, 1893.

When the cause of action accrued the compiled statutes of Montana contained these sections:

> "Sec. 45. In an action for a penalty or forfeiture, when the action is given to an individual, or to an individual and the territory, except when the statute imposing it prescribes a different limitation. Second, an action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process . . . shall be commenced within one year from the time the cause of action accrued."

> "Sec. 50. If when the cause of action shall accrue against a person when he is out of the territory, the action may be commenced within the time herein limited, after his return to the territory; and if after the cause of action shall have accrued he depart from this territory, the time of his absence shall not be a part of the time limited for the commencement of the action."

Both of these sections were repealed by the "Code of Civil Procedure" of Montana, Section 3482, which went into effect July 1, 1895; and on the same day a new code, "The Civil Code of Montana," went into effect, in which the Section 460 of Chapter 25 of the Fifth Division of the Compiled Statutes of Montana, above quoted (being the statute upon which this action is based), was re-enacted, without change, as Section 451 of said new code.

The Code of Civil Procedure (of Montana), which also went into effect on the same day, July 1, 1895, contains a separate *title* numbered II, containing four chapters (Sections 470 to 559). This title deals exclusively with " the time of commencing actions." It contains the following sections:

> " Section 515. Within two years.
>
> "(1.) An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

> " Section 541. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

And also:

> " Section 554. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability created."

The statute of Connecticut upon which the defendant relied, if the statute of the forum should be found applicable to the cause of action, is Section 1379 of the General Statutes of Connecticut (1888), (being Section 1120 of the General Statutes of Connecticut, Revision 1902), which reads as follows:

> " Section 1379. No suit for any forfeiture, upon any penal statute, shall be brought but within one year next after the commission of the offense."

The defendants demurred to the complaint on the three following grounds:

> "1. Because it appears from the complaint that the several causes of action therein alleged accrued more than one year prior to the commencement of the action":

that being the period of limitation prescribed by Section 1379 of the General Statutes of Connecticut (Revision of 1888), within which a suit may be instituted for a forfeiture under a penal statute, and also the period prescribed by Section 45 of the Compiled Statutes of Montana, above quoted, which was in force when the right of action accrued.

> "2. Because it appears from the complaint that the several causes of action therein alleged all accrued more than two years prior to the commencement of the action":

this being the time limited for the commencement of an action for a penalty or forfeiture under the new statute, Section 515 of the Code of Civil Procedure of the State of Montana, above quoted.

> "3. Because it appears from the complaint that the several causes of action therein alleged all accrued more than three years prior to the commencement of the action":

this being the period specially limited by Section 554 of the Code of Civil Procedure of the State of Montana, above quoted, within which "actions against directors of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, *must be brought.*"

In the United States Circuit Court for the District of Connecticut Judge Townsend sustained this demurrer of the defendant. We quote his opinion, reported in 113 Fed. Rep., p. 678:

"Demurrer to complaint in action at law. This case has already been considered on motion for leave to amend (83 Fed., 982), and on demurrer to plea to jurisdiction (99 Fed., 39). The present demurrer is on the ground that the cause of action is barred by the statutes of limitations both of Montana and Connecticut. The defendants contend as follows:

> "'First, that the statute of the state of Montana under which this action is brought is penal, in so far as the application of the statute of limitations is concerned; second, that the statute of limitations of the state of Montana must govern the decision of this court; and, third, that, whether the statute of the state of Montana or the statute of the state of Connecticut is applied, the court must hold that the plaintiff's cause of action is barred.'

"The question of the character of the Montana statute was exhaustively discussed on a former hearing, and was fully considered in the opinion. The conclusion was there reached that the statute was not a penal one in the sense that it could not be enforced in a foreign jurisdiction. 99 Fed., 39. The statute of Montana (Code Civ. Proc., § 515) reads as follows:

> "'Sec. 515. Within two years. (1) An action upon a statute for a penalty or forfeiture when the action is given to the individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.'

"The Connecticut general statute as to penalties is as follows:

> "'Sec. 1379. No suit for any forfeiture upon any penal statute shall be brought but within one year next after the commission of the offense.'

"That the statutory liability in this case comes within the terms of the Montana statute has been decided in the

highest court of that state (Gans v. Switzer, 9 Mont., 408, 413; 24 Pac., 18; Elkhorn Trading Co. v. Tacoma Min. Co., 16 Mont., 322; 40 Pac., 606; Bank v. Johnson, 45 Pac., 662; 33 L. R. A., 552; 56 Am. St. Rep., 591; Wethey v. Kemper, 17 Mont., 491; 43 Pac., 716), and the construction of the Montana statute is binding upon this court. Plaintiff claims strongly that the Connecticut statute of limitations, and not that of Montana, must be applied. If the liability comes within the terms of the Montana statute, it would seem that it also comes within that of the Connecticut statute. The words 'penalty or forfeiture' in the Montana statute are substantially equivalent to the words 'forfeiture upon any penal statute' in the Connecticut statute. If the Connecticut statute above quoted is not applicable, it is not clear that any statute of that state would bar this action, and the liability of defendants might thus be continued indefinitely. While there is no decision of the highest court in Connecticut precisely bearing upon the question arising here, Mitchell v. Hotchkiss, 48 Conn., 18; 40 Am. Rep., 146, concerns a somewhat similar state of facts. The Connecticut statute provided that if the president and secretary of a corporation should intentionally neglect or refuse to file annually certificates showing the condition of the corporation with the town clerk, those officers should be liable for all the debts of the corporation contracted during the period of such neglect. The question raised was whether the cause of action survived the death of the officer who had become liable under this statute. The court held that the statute did not create any contract relation or duty between the creditors of the corporation and its president; that there was no privity between the president and the plaintiff, and that the former had owed the latter 'no private duty from which a promise might be implied'; that the duty to be performed was a public duty, required by public policy for the general welfare; and that the willful neglect of the prescribed duty was a public wrong, invoking the penalty of the statute, — and cites various authorities to the same effect. A comparison of Mitchell v. Hotchkiss, supra, with Plumb v. Griffin, 74 Conn., 132; 50 Atl., 1, very recently decided in the Supreme Court of Connecticut, confirms this view. A statute of Connecticut provides

that 'any person who cuts trees or timber on the land of another without a license shall pay to the party injured two dollars for every tree, or one for any timber.' It was claimed that this was a forfeiture, and that suit must be brought within one year. The court holds that a statute which merely gives to the party injured increased damages is not a penal statute. In Mitchell v. Hotchkiss the court held that the statute making officers of corporations liable for failure to file reports comes clearly within the definition of a penal one, and that the action did not survive against the executor. If necessary for the decision of this case, it should be held, following the intimation in Hobbs v. Bank, 37 C. C. A., 513; 96 Fed., 396; id., 41 C. C. A., 205; 101 Fed., 75, and the decision in Brunswick Terminal Co. v. National Bank of Baltimore, 40 C. C. A., 22; 99 Fed., 635; 48 L. R. A., 625, that the Montana statute of limitations controls the operation of the statute governing the penalty in other states as well as in Montana; and, if this be not so, it should be held that the action is for a penalty and should be brought within one year under the Connecticut statute.

"The demurrer is sustained."

This writ of error was then sued out by the plaintiff in error to the Circuit Court of Appeals for the Second Circuit, in which was contested not only all the defenses based on said several statutes, but it was further claimed by the plaintiff that the defense of the statute of limitations could not be raised in this action by demurrer.

The Circuit Court of Appeals, as appears by their opinion, 121 Fed. Rep., page 703, overruled this latter claim, and held that the defense of the statute of limitations might properly be raised by demurrer — relying upon the Connecticut case of The Hartford & Connecticut Western R. R. Co. vs. Montague, 72 Conn., 692, as establishing the Connecticut practice which was controlling.

Said Circuit Court of Appeals further held that the provisions of the section of the General Statutes of the State of Connecticut, above referred to, limiting a time for bringing suits for any forfeiture upon a penal statute (ante, page 7), did not apply to the cause of action set forth in the complaint. This conclusion was based upon a Connecticut decision (Plumb vs. Griffin, 74 Conn., 132), a case not at all analogous to that here presented. While the decision of that case commends itself, much of its opinion was obiter and assumed a rule of construction which, with all respect, we cannot believe the Court of Connecticut would itself follow.

Said Circuit Court of Appeals further held that, Section 45 of the Compiled Statutes of Montana, above quoted, having been repealed, July 1, 1895, by the new Code of Civil Procedure, the effect of that legislation was to abrogate the old Section 45 of the Compiled Statutes.

Said Court of Appeals further held that by reason of Section 554, above referred to, none of the provisions of Section 515 were ever applicable to such a cause of action as that set forth in the complaint.

Said Circuit Court of Appeals, however, did not agree as to whether the provisions of said Section 554 were applicable to this cause of action brought in the State of Connecticut.

In view of all these facts and considerations, which are fully set out in the record which was before the Circuit Court of Appeals and which are discussed in the opinion rendered, said Circuit Court of Appeals certified to this court the following question:

May the Defendant, in an Action of the Kind Specified in Section 554 of the Code of Civil Procedure of Montana Avail of a Limitation Therein Prescribed, When the Action is Brought Against Him in the Court of Another State?

The defendant claims:

1. Where a state creates a new right, arising wholly from its statute, which right is not known to the common law and does not arise out of any contract, or from any tort, and a statute of that state also fixes a time within which actions under that statute to enforce that right *must be brought,* while suit upon such statute may be brought in another state, it *must* be brought within the time limited by the statute of the state which created the right.

This rule is especially applicable to penal actions and to actions of a penal nature.

2. The statute of Montana, under the authority of which this suit is brought, is penal at least in so far as the application of the proper statute of limitations is concerned. It has been so generally held, so judicially construed by the highest courts of its own state, and, by re-enactment of the statute, that construction has been adopted by the legislature of the state, and is now beyond controversy.

3. Section 554 of the Code of Civil Procedure of Montana was specifically and in terms made to apply to actions under said statute which created the liability, and is as effectually a part of the same as

though actually contained in the same section. It limits the liability and bars the right. It operates infallibly and without condition, whenever and wherever the right is sought to be enforced.

ARGUMENT.

I.

Where the statute of a state gives a new right arising solely on that statute, and not arising by common law or by contract or from any tort, and the statute of that state also fixes a limitation of time within which suit must be brought to enforce such right, when such suit is brought in another state, the right to sue and the limitation of the time of suing go together.

The new right of action being unknown to the forum, and being enforced in Connecticut only on the ground of comity between states, the whole law of the home state upon the subject, that creating the right and that limiting or explaining the right are to be treated, for the purposes of this suit, as though they were on the statute book of the forum.

It is a general rule that a cause of action not grounded on contract or existing at common law, but founded entirely on the statute, takes the statute of limitations with it.

Thus, Wood on Limitations, 2d Ed., page 35, says:

> "When the statute of a particular state or country gives a remedy which did not exist at common law, and

at the same time limits the period within which action therefor shall be brought, the period of limitation thus named controls in whatever jurisdiction action may be brought."

So, also, Buswell, in his work on Limitations and Adverse Possession, Section 351, states the law as follows:

"The same principle applies to cases in which the plaintiff's cause of action arises from the operation of a statute which confers upon him a right which did not exist at common law. Such a right can only be pursued in a foreign state subject to all the conditions and limitations imposed by the statute which creates it; for the conditions qualify the right and are an integral part of it, and unless these are fully complied with the right does not exist. So if an action to enforce such a right be brought in a foreign state, the limitation of the *lex loci contractus* will apply; for to apply a contrary rule would be to uphold a right of action not existing at common law, and which has been lost under the foreign statute which created the remedy as supplementary to the common law. This rule was applied in an action brought in Michigan under a Canadian statute giving to administrators the right to recover damages for the death of passengers killed by the negligence of common carriers, it being held that the limitation to such actions fixed by the Canadian statute would apply. Where, under a decree of the court of a state, assessments were laid upon shares of corporate stock and an action was brought in another state to recover such assessments, it was held that the limitation would run upon such suit only from the time of the assessment made by the decree of the court in the former state, although by the local law of the latter state the action would be barred."

In the case of Boyd, Admr., vs. Clark et al., 8th Fed. Rep., 849, Mr. Justice Brown, then district judge, held the following to be the rule (page 852):

"The true rule I conceive to be this: that where a statute gives a right of action unknown to the common

> law, and, either in a proviso to the section conferring the right, *or in a separate section,* limits the time within which an action shall be brought, such limitation is operative in any other jurisdiction wherein the plaintiff may sue."

The doctrine thus held by Justice Brown was distinctly approved in the case of Theroux vs. Northern Pac. R. R. Co. et al., 64 Fed. Rep., 85, where the Circuit Court of Appeals for the Eighth Circuit say (Thayer, J., rendering the opinion):

> "It was held in Boyd v. Clark, 8 Fed. Rep., 849, which is a leading case on the subject, that when a statute of a state or country gives a right of action unknown to the common law, and, in conferring the rights, limits the time within which action may be brought, such limitation is operative in any jurisdiction where it is sought to enforce such cause of action. The same doctrine was recognized and approved in the following cases: The Harrisburg, 119 U. S., 199, 214; 7 Sup. Ct., 140; Munos v. Southern Pac. Co., 2 U. S. App., 222; 2 C. C. A., 163; 51 Fed., 188; Eastwood v. Kennedy, 44 Md., 563; Railway Co. v. Hine, 25 Ohio St., 629, and O'Shields v. Railway Co., 83 Ga., 621; 10 S. E., 268. Indeed, it may be said that cases of the kind last referred to form a well-established exception to the general doctrine that the *lex fori* governs in determining whether a cause of action is barred by limitation."

So, in The Harrisburg, 119 U. S., 199, 214. This was a suit in the District Court of the United States for the Eastern District of Pennsylvania to recover damages for a death occasioned by negligence of a steamer in a collision in a sound of the sea embraced within the coast of Massachusetts. By the statutes of Massachusetts and Pennsylvania in force at the time of the collision the time for commencing an action of this character was limited to one year from

the date of injury. Mr. Chief Justice Waite in discussing the suit says:

> "The statutes create a new liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all."

And, as stated by Judge Thayer in the case of Theroux vs. Northern Pac. Railway Co., supra, page 86:

> "The same thought was expressed by the Supreme Court of Ohio in Railway Co. v. Hine, supra, and by the Supreme Court of Maryland in Eastwood v. Kennedy, supra. In the Ohio case it was said that a proviso contained in a statute creating a new cause of action which limits the right to sue to two years is a condition qualifying the right of action, and not a mere limitation of the remedy. It must be accepted, therefore, as the established doctrine, that where a statute confers a new right, which by the terms of the act is enforceable by suit only within a given period, the period allowed for its enforcement is a constituent part of the liability intended to be created, and of the right intended to be conferred. The period prescribed for bringing suit in such cases is not like an ordinary statute of limitations, which merely affects the remedy."

Many other cases might be added to this list in which the law has been laid down in strict harmony with the foregoing quotations.

A large number of these cases are suits brought upon statutes giving a right of action for wrongful death and in which the provision limiting a time for bringing suit is a part of the statute giving the remedy.

The same doctrine is to be found laid down in the case of Dennick vs. Railroad, 103 U. S., 11. This was an action brought in the State Court of New York against the Central R. R. Co. of New Jersey to recover damages for an accident on the defendant's railroad. The case was removed to the Circuit Court of the United States for the Northern District of New York, and subsequently by writ of error brought to this honorable court. This court, after full consideration, held, Mr. Justice Miller delivering the opinion (page 20):

> "But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, so any court having control of her can compel distribution of the amount received in the manner prescribed by that statute."

In other words, as stated by Mr. Justice Brown, in Boyd vs. Clark, supra (page 850):

> "It is a well established principle of law that where a right of action is given by a state statute such right may be enforced in another state, and also that such right will be enforced according to the forms and modes of procedure in use in the latter state. Or, to put it briefly, the *lex loci contractus* governs the rights of parties, but the *lex fori* determines the remedy. This principle has been applied in a large number of cases arising upon contracts, but in the recent case of Dennick v. Railroad Co., 103 U. S., 11, it was applied to a statute of this description, where the administrator brought his action in another state."

In this case the plaintiff has claimed, however, that the limitation of the state giving the right, to be

effective elsewhere, must be included in the same section of the statute.

We maintain that this contention cannot be sustained, where, as in the case at bar, the statute of limitations relied on expressly refers to the statute upon which the right of action is based, and expressly excludes the latter from the operation of its chapters containing the general statutes of limitations.

In the case at bar the statute of limitations of the State of Montana, Section 554 of the Code of Civil Procedure, by its terms provides that actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, *must be brought* within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability created.

This section of the statute of the State of Montana went into effect, as has already been stated, upon the same day that the statute giving the right of action upon which the defendants are sued in this case went into effect, to wit, on the 1st day of July, 1895.

The legislature saw fit, instead of placing this statute in the same section with the statute creating the liability, to place it with its statutes of limitation, under a separate title, where it would effectually negative or exclude the operation of the general limitations upon the remedy. To claim that it does not apply to and limit the right created by the section

imposing the liability is to allow to this statute no effect whatsoever.

In other words, it in effect erases and makes null and void the limitation which it attempts to create.

In this connection it should be observed that in the case of The Harrisburg, supra, the statute of Massachusetts, referred to by the court in its opinion, inflicting the penalty for the loss of life by reason of the negligence of a corporation, was contained in Sections 97 and 98, Chapter 63 of the General Statutes of Massachusetts for 1860, while the statute limiting a time for the prosecution of an indictment for such penalty was contained in Section 99; and the statute of Pennsylvania, referred to in the same case, authorizing suit for damages for the loss of life by negligence, was contained in Section 19 of the laws of 1851, page 674, while the statute limiting the right to bring such action to one year was contained in Section 2 of the laws of 1855, page 309.

In other words, this court in that case distinctly upheld the principle for which we are here contending.

The claim of the plaintiff, we suppose, will be that in all cases where a right is given by statute and the act giving the right expressly provides that the existence of the right itself shall depend on the bringing a suit within a specified time, then the suit must be brought within that time whether brought in the state or elsewhere, but that in the case of a general statute of limitation no such rule applies and the *lex fori* is to be followed, because in such cases there is

not an express provision that the right itself shall depend on bringing the suit within a specified time, and some courts have adopted this view.

We submit that this is an error caused by a want of discrimination between different classes of cases.

There is one class where a statute says that all stockholders shall be liable to the extent of double the par value of the stock, or even more.

In this class of cases this, as well as other courts, have held that the obligation is contractual; that is, that when a subscription is made the subscriber agrees to pay this additional liability just as much as he does to pay the par value of the stock he subscribes for.

Whitman vs. Bank, 176 U. S., 569.

Being then merely an action on a contract the general statute of limitation may be said, with some reason, not to go with it to a foreign state.

So in the case of statutes providing that actions may be brought for a death caused by negligence. It is held that the negligence which caused the death is the real ground of action and that negligence and liability existed apart from any statute. By the rules of the common law no action could be brought for the death of a person for the very wise reason, among others, that the injury was too great to be justly estimated in damages, and it is held that all that the statute did was merely to remove this bar.

The statute was not the foundation of the liability; that was caused by the negligence.

Stewart vs. Baltimore R. R., 168 U. S., 445.

In such cases, therefore, as the statute does not create the liability, but the liability arises from the tort of the defendant, it may also be said that the general statute of limitations as to actions on torts does not go with it.

This case at bar, however, is not like either of the cases above referred to.

There was no contract of any kind here, nor was there any negligence of the defendant that caused any injury of any kind to others. No one trusted the company on the strength of any acts of the defendant. The statute alone imposed the duty, and said that if that duty was not performed the defendant should be liable. This made the statute a very penal one and, as we have shown, where a statute is clearly penal, a statute of the state enacting it limiting the time within which an action can be brought for the penalty goes with it, and is held to be a limitation of the right just as much as if it were made a proviso to each statute which imposed a penalty.

In some cases of this kind the courts have evidently overlooked the distinction between the liability of stockholders and trustees, and because a statute making stockholders liable for more than the par value of their stock constituted a part of the contract of subscription, have assumed that the liabilities of stockholders and of trustees are of the same character.

But this is clearly an error. The liability of the trustees does not arise from any contract or agreement, as does that of stockholders.

The trustees may not be stockholders, and their position is entirely different.

It is suggested also in some of the cases that all liability of stockholders arises from statute, and that if it were not for statutes they would all be liable as partners for all the debts of the corporations. But this is also an error. As a general rule the limitation of the liability of the stockholders to the amount of their subscription is by common law, and only their liability beyond that is imposed by statute.

1 Cook on Stockholders, Sec. 212.

II.

The statute of the state of Montana under which the suit is brought, at least so far as the application of the statute of limitations is concerned, under the decisions of the highest courts of that state, is penal.

In view of the opinion of the Circuit Court of Appeals that the enactment of Section 554 of the Code of Civil Procedure of Montana, upon which the question submitted by them to this court is based, superseded Section 515 of said Code of Civil Procedure and made the provisions of said section inapplicable to such a cause of action as is set out in the complaint,

the question arises as to whether or not the statute of Montana giving the right of action against the trustees on account of failure to file their annual reports is so far penal that, except for the passage of Section 554, Section 515 would have applied.

Prior to the decision of the Supreme Court of the United States in the case of Huntington vs. Attrill (146 U. S., 657), the consensus of opinion throughout the courts of the United States had been that statutes enforcing upon directors or trustees of corporations liability for the debts of a corporation on account of failure to file reports provided by law were penal.

Bank vs. Bliss, 35 N. Y., 412.
Veeder vs. Baker, 83 N. Y., 160.
Stokes vs. Stickney, 96 N. Y., 323.
Engine Co. vs. Hubbard, 101 U. S., 188.
Chase vs. Curtis, 113 U. S., 452.
Lawle vs. Burt, 7 Ohio St., 340.
Sturgis vs. Burton, 8 Ohio St., 215.
Knox vs. Baldwin, 80 N. Y., 610.
3d Thompson Comm. Corporations, Sec. 4361, *et seq.*

In the case of Engine Co. vs. Hubbard, supra, this court, Mr. Justice Clifford, on page 192, said as follows:

> "Repeated instances have occurred where suit was brought in one state to enforce the statute liability for the debts of a corporation created by the legislature of another state, in all which it is held that the statute is penal, and that it can only be enforced in the state where the statute was passed. Halsey v. McLean, 12 Allen (Mass.), 438; Derrickson v. Smith, 3 Dutch (N. J.), 166; Sturges v. Burton, 8 Ohio St., 215; Bank v. Price, 33 Md., 487; Irwin v. McKeon, 23 Cal., 472.

> "Corresponding decisions have been made in other courts, and to such an extent as to justify the remark that the rule is universal. Bird v. Hayden, 1 Robt. (N. Y.), 383; Moier v. Sprague, 9 R. I., 541."

The law as laid down in that case had been considered as settled until the decision in the case of Huntington vs. Attrill.

Since that decision the decisions of the courts throughout the United States have been involved in uncertainty and disagreement as to the extent to which this court intended to hold that statutes of the character of the one sued on in this case were not penal.

Clearly it was not intended in that case to hold that the statute was not penal in any sense whatever, for the court, Mr. Justice Gray, in rendering the opinion, page 676, said:

> "As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed."

The sole question there was whether or not the statute in question was so far a penal act as to come under the rule that one state would not enforce the criminal laws of another, and the court held it was not; that the word "penal" had different meanings, and the statute might be penal as to construction, etc., though not penal in an international sense — that is, in so far as not to be enforceable at all in the courts of another state. The question as to whether the statute was penal under the meaning of the word in the statute of limitations did not arise at all.

In the case of Brady vs. Daly, 175 U. S., 148, this court, Mr. Justice Peckham delivering the opinion, gives an interpretation of the decision in Huntington vs. Attrill, supra, in harmony with the views we have presented, and on page 155 the court says:

> "In Huntington v. Attrill, 146 U. S., 657, 667, there is a very full discussion of the meaning of the word 'penal' when used in reference to the maxim of international law that 'The courts of no country execute the penal laws of another.'"

In Patterson vs. Thompson, 86 Fed. Rep., 85 (1898), Judge Gilbert of the United States Circuit Court for the District of Oregon was required to determine whether a statute prescribing a similar liability was, or was not, penal. The statute read:

> "If the directors of a corporation declare and pay dividends when the corporation is insolvent, or which render it insolvent or diminish the amount of its capital stock, such directors shall be jointly and severally liable for the debts of the corporation then existing or incurred while they remain in office."

The defendant, as here, demurred, one ground of demurrer being that the action was not brought within three years limited by the statute for the commencement of actions to recover penalty. The demurrer was sustained, the court holding that in so far as the directors were concerned the statute was in the nature of a penalty, and Judge Gilbert clearly and forcefully presented both the reasons and the weight of authority leading to this result, citing a number of recognized authorities upon the subject. The whole opinion is very instructive.

In that case, Huntington vs. Attrill, supra, was urged by the plaintiff in support of his contention that the Supreme Court had overruled its former holding that such a statute is penal; but the court overruled this contention, holding that Huntington vs. Attrill held such statutes to be penal only in the international sense — that is, that they may be enforced in other states than that in which the liability was created. We quote (page 87):

> "Counsel for the plaintiff contend that by the decision in Huntington v. Attrill, 146 U. S., 657, 13 Sup. Ct., 224, the supreme court has overruled its former holding that such a statute is penal. It will be seen, however, on a careful consideration of that case, that the decision was based upon a consideration of the remedial purpose of the statute and the protection intended to the creditor, and that the court went no further than to hold that such a statute is not penal, in the sense that it will not be enforced in a state other than that in which the liability was created. In the later case of Bank v. Remsen, 158 U. S., 337, 15 Sup. Ct., 891, it was again ruled that such a statute is one of a penal character, and in the opinion the court remarked that the purport of the decision in Huntington v. Attrill was that such a statute was not 'a penal law in the international sense.'"

The statute limiting the time for the commencement of actions for the recovery of penalties was held to be the statute applicable to such actions.

In National Park Bank of New York vs. Remsen et al. (1895), 158 U. S., 337, 15 Sup. Ct., 891, it was held that the statute of New York, which is nearly identical with that upon which this action is brought, was penal so far, at least, as the trustee was concerned, notwithstanding Huntington vs. Attrill, supra, which it interprets.

Mr. Justice Brewer, speaking in that case for the court, and without dissent, said (page 342):

> "That this statute is one of a penal character is settled, not merely by various decisions of the Court of Appeals of New York, but also expressly by this court in Chase v. Curtis, 113 U. S., 452, though as since held not 'a penal law in the international sense.' Huntington v. Attrill, 146 U. S., 657, 13 Sup. Ct., 224."

See also Chase vs. Curtis, 113 U. S., 452.

We maintain, therefore, that the case of Huntington vs. Attrill is not in point so far as our present contention is concerned.

While it is admitted that suits may be brought in other states to enforce the right of action given by such a statute as that here sued on, it by no means follows that the statute is not to be regarded as penal, not only in so far as its construction is concerned, but also in so far as the application of the statute of limitations is concerned.

The case of State Savings Bank of Butte City vs. Johnson, decided in Montana in the year 1896, four years after the decision in Huntington vs. Attrill, and reported in 18 Mont., 440, 45 Pac. Rep., 662, was in all respects on a parallel with the one at bar. The opinion of the court recognizes the fact that for some purposes statutes like the one in question may not be penal, but, referring to other Montana decisions in which the same question had arisen, the court says:

> "A statute of this nature is not universally held to be penal. (Thomp. Corp., § 4165; Morawetz, Priv. Corp., § 907 *et seq.*) But we are of opinion that, in applying the appropriate section of the statute of limitations, the action is classified as penal. (Gans. v. Switzer, 9 Mon., 413; 24 Pac., 18; Elkhorn Trad. Co. v. Tacoma

Mining Co., 16 Mon., 322; 40 Pac., 606; Wethey v. Kemper, 17 Mon., 491; 43 Pac., 716. Therefore, the action being for a penalty, the cause of action is barred in one year from the accruing thereof. (Code Civil Proc., 1887, § 45.) The accounts against the corporation matured at different times during the years 1891 and 1892. The trustees defaulted in making their report, required by law, both in 1891 and 1892, and, indeed, during every year. As to some of the accounts, the cause of action arose against the trustees upon their default in 1891, and upon others in 1892. This action was commenced in 1894. Therefore as to all of the accounts more than one year had run since the accruing of the liability by the trustees by reason of their default in filing the papers required by law."

We call the court's attention also to the case of Wethey vs. Kemper, 17 Mont., 491 (1895), where the court, referring to the statute in question, holds that the same is penal.

In Manhattan Trust Co. vs. Davis, 23 Mont., 273, decided in October, 1899, the cases of Gans vs. Switzer, Wethey vs. Kemper, and State Savings Bank vs. Johnson, supra, are cited with approval.

Moreover, the legislature of the State of Montana so understood the law and intended that the Section 515 of said code should apply to actions brought on the statute in question. This appears from the official publication of said code, Vol. 2, page 79, from which we quote as follows:

"THE MONTANA CODES ANNOTATED.

"In force on the 1st day of July, A.D. 1895.

"Chapter III.

"The time of commencing actions other than for the recovery of Real Property.

"Sec. 515. Within two years:

"1. An action upon a statute for a penalty or for-

feiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

"2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state.

"3. An action for libel, slander, assault, battery, false imprisonment, or seduction."

"STATUTORY PENALTY.

"An action against the trustees of a corporation to charge them with the debts of the company, because of its failure to file an annual report, comes within this section: Losee v. Bullard, 79 N. Y., 404; Knox v. Baldwin, 80 *id.*, 610; Duckworth v. Roach, 81 *id.*, 49. So an action given against the seller of a lottery ticket to recover double the sum paid; Grover v. Morris, 73 N. Y., 473."

It may be claimed that the decisions of the Supreme Court of Montana, supra, were with reference to the old statute of Montana, Section 45 of the Compiled Statutes, supra.

It is to be observed, however, that the new statute is identical in its terms with the old, with the exception of the injection of the words *"upon a statute,"* which we have italicized in the comparative reading which follows:

THE OLD Sec. 45.	THE NEW Sec. 515.
"In an action for a penalty or forfeiture, when the action is given to an individual, or to an individual and the territory, except when the statute imposing it prescribes a different limitation."	"An action *upon a statute* for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

The construction of this statute by the Montana court of last resort will be followed everywhere until changed at home.

Flash vs. Conn, 109 U. S., 371-378.

The construction of the Montana statute here sued upon has not only not been changed at home, but it has been since re-enacted without change, and thereby the construction of the Montana courts has been, in effect, enacted into it and confirmed by the legislature.

It is a familiar and imperative rule of construction of statutes that when the courts of a state have interpreted one of the statutes of that state and given to that statute a construction, if that statute is subsequently re-enacted or amended in any way which does not manifest an intent to change the construction, the re-enactment carries with it the judicial construction which it had previously received and makes that construction a part of the new statute, which must be thereafter read into it.

For the purpose of this discussion we need only to quote from the very recent case of Barrett's Appeal from the Board of Relief, 73 Conn., 288, where a Connecticut statute was being construed which had been re-enacted after a previous construction by the Supreme Court of Connecticut, and Judge Baldwin, speaking for that court, held that the former construction of the old statute was conclusively adopted by the legislature in re-enacting the statute in the same terms. We quote (page 291):

> "But in the Revision of 1888 the statutes which had been the subject of examination in Batterson v. Hartford

were reënacted in substantially the same terms. This carried with them and made a part of them the judicial construction which they had previously received. Crum v. Bliss, 47 Conn., 592, 599; Lounsbury v. Bridgeport, 66 *id.*, 360, 367; State *ex rel.* Judson v. County Commissioners, 68 *id.*, 16, 23; State v. Travelers Ins. Co., 70 *id.*, 590, 601, 603. Under these circumstances it is too late to inquire whether the original statutes, regulating returns to assessors of the market value of shares in trust or insurance companies, were intended to give the exemption of which the appellants now claim the benefit. That such was their intent was assumed in Batterson v. Hartford, and conclusively affirmed by the legislature by incorporating them, without substantial change, after they had thus received that construction, in the General Statutes. Whether, therefore, were the question of construction one to be examined *de novo*, we should or should not have reached any different conclusion, is immaterial."

We submit, therefore, that the legislative action of Montana " has carried into these statutes and made a part of them " the construction which we claim, and that irrespective of and notwithstanding any decisions of other courts, or any decisions which other courts could make as interpreting similar statutes of other states, this Montana statute of limitations referred to has been, by legislative action, made applicable to the statutory cause of action herein invoked, and that that construction is *imperative* everywhere until changed in Montana.

This construction, therefore, comes to this court along with the statute and imperatively compels this court to treat the statute sued upon as penal, and in the language of the Montana statute of limitation a " statute for a penalty or forfeiture."

Aside from the construction placed upon this Montana statute by the Supreme Court of that state

and by its legislature, we maintain that while such statute may not be held to be penal in the international sense, as laid down in Huntington vs. Attrill, yet it must in reason be held to be penal in many other respects.

The statute imposes liability in case of failure to make the returns required upon all the trustees of the company jointly and severally for all debts of the company then existing and for all that shall be contracted before such report shall be made.

Such a statute cannot in any way be held to be contractual.

It gives to parties who have contracted debts prior to the default a right to collect such debts from the trustees on account of their failure to comply with the terms of the statute. Such creditors cannot in any sense be held to have contracted their debts in view of such failures or of the fact that the trustees were in any sense an original party or surety for the claim.

As was said in the case of Gregory vs. German Bank of Denver, 3 Col., 332, which was an action in assumpsit against a trustee upon a statute substantially identical with the one here in question:

> "The liability of the trustees arising from a failure to publish an annual report is in no way related to the loss that creditors of the company may sustain by reason of such violation of the statute. The joint and several liability attaches to the trustees, not because creditors of the

company contracted with them, not because the corporation is insolvent, but because they neglected to perform a duty enjoined by law. It cannot be said that creditors of the company contracted with reference to any indemnity afforded by this section.

"Until the 20th day of January of each year, contracts are entered into with the corporation without regard to the possible failure of the trustees to publish their annual reports, and their consequent liability for the debts of the company. This statute is in its nature penal. It prescribes a determinate penalty for neglect of a duty, imposed by law, upon the trustees of companies . . . The amount of the forfeiture is measured by the aggregate debt contracted by the company. The liability is not founded upon contract, but arises from misconduct in office."

See also Mitchell vs. Hotchkiss, 48 Conn., 9. Patterson vs. Thompson, 86 Fed. Rep., 85.

Some confusion has arisen by confounding the liability of trustees imposed by statute for failure to make returns with the liability imposed upon stockholders for debts of the corporation. This distinction between the two classes of liabilities is clearly brought out in the cases of Whitman vs. The Oxford National Bank, 176 U. S., pages 559, 563, and Whitman vs. Citizens Bank et al., 110 Fed. Rep., 503, 506, 507.

In the case of Whitman vs. The Oxford National Bank this court (page 563) says:

"The liability which by the constitution and statutes is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature. It would not be doubted that if the stockholders in this corporation had formed a partnership, the obligations of each partner to the others and to creditors would be contractual, and

determined by the general common law in respect to partnerships. If Kansas had provided for partnerships with limited liability, and these parties, complying with the provisions of the statute, had formed such a partnership, it would also be true that their obligations to one another and to creditors would be contractual, although only in the statute was to be found the authority for the creation of such obligations. And it is none the less so when these same stockholders organized a corporation under a law of Kansas which prescribed the nature of the obligations which each thereby assumed to the others and to the creditors. While the statute of Kansas permitted the forming of the corporation under certain conditions, the action of these parties was purely voluntary. In other words, they entered into a contract authorized by statute."

And in Whitman vs. Citizens Bank in 110 Fed. Rep., supra, decision upon this point was based upon the decision of the Supreme Court in the Oxford Bank case, above cited.

In fact, it seems to have been assumed in these cases that if the liability had been entirely statutory, and not contractual, the statute of limitations of Kansas would have governed. The whole argument of the opinion is based upon that distinction. If the same rule was to be applied to rights of action purely statutory in the same manner as to contractual obligations this court would have said so at once.

The same doctrine is discussed in the case of Jones vs. Barlow, 62 N. Y., 202, 210, where the court, Judge Folger, says as to the liability of trustees:

> " The language of the cases is, that this act is a highly penal one, extremely rigorous in its provisions (Miller v. White, 50 N. Y., 137); and it is said that the statute imposes a penalty upon the trustees for the omission of a prescribed duty, by compelling them to pay the debt of

another. To be sure, the stockholder, in his liability for the debts of the company, has been likened to a surety or a guarantor. (Moss v. McCullough, 5 Hill, 131, and some of the cases there cited.)

"But that liability arises not from the neglect of the stockholder and is not imposed as a punishment as for a wrong done. It is more in the nature of a contract implied from his becoming a stockholder, and he is liable in an original and primary sense, like a partner or member of an unincorporated association. (Corning v. McCullough, 1 N. Y., 47.) But a trustee made liable by the neglect to file a report is compelled to pay the debt of the company not upon a liability in any manner arising out of contract, or as strictly collateral to the contract or obligation of another, but as a punishment, a forfeiture for a wrong done. Bolen v. Crosby (49 N. Y., 183), though it speaks of the claims against the trustees as being collateral and incidental to the debt against the company, does not conflict with this view. For it is not the debt which they are compelled to pay, but a penalty, not in any manner arising from their contract, the extent of which is measured by the amount of the debt against the company."

It is to be observed that the statute of Montana in question is in substance the same as the statute of the State of New York governing the liability of trustees for failure to make annual returns, and that the New York statute has been repeatedly held to be penal in its nature, as will appear from the citations already given and many others which might be added.

III.

Section 554 of the Code of Civil Procedure of Montana, having superseded Section 515 and made the same inapplicable to such a cause of action as is set out in the complaint, while not a part of the section of the statute which creates the liability, refers to that section in terms, and is as much a part of it as if it had been contained in the same section; and when suit is brought to enforce the liability created by that statute it must be brought within the time limited in Section 554.

It is clear that except for the fact, as laid down by the Circuit Court of Appeals, that Section 554 has rendered the provision of Section 515 inapplicable to the cause of action set out in the complaint, it must have been held that the causes of action sued on were barred by the provisions of Section 515.

Section 554 comes, therefore, within the exception of Section 515 as follows: "Except when the statute imposing it prescribes a different limitation."

The doctrine for which we are contending is distinctly laid down in the case of Brunswick Terminal Co. vs. National Bank of Baltimore, decided by the Circuit Court of Appeals for the Fourth Circuit, February 6, 1900, 99th Fed. Rep., 635. In this case the bill was filed by the appellants, creditors of the Brunswick State Bank of Georgia, against the National Bank of Baltimore in the Circuit Court of the United States for the District of Maryland.

The Code of Georgia of 1882, Section 1496, provided as follows:

> "When a stockholder in any bank or other corporation is individually liable under the charter, and shall ity, unless he receives a written notice from a creditor, within six months after such transfer, of his intention to hold him liable: Provided he shall give notice once a month, for six months, of such transfer, immediately thereafter, in two newspapers in or nearest the places where said institution shall keep its principal office."

The appellee was at one time a stockholder of the Brunswick State Bank of Georgia, and, upon transfer of its stock, failed to comply with the statutory provisions last set forth, and appellants claimed that it had incurred the stockholders' liability provided for in the charter of the bank, and was by reason thereof liable to them.

The Code of Georgia of 1882, Section 2916, provided as follows:

> "All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues."

The single question determined in that case was whether the statute of limitations of the State of Maryland or of the State of Georgia applied to the claim.

The Circuit Court of Appeals for the Fourth Circuit held that the statute of the State of Georgia governed the case and not the Maryland statute. The court in its opinion (page 639) says:

> "Counsel for appellee insists that the Georgia act of limitation, above quoted, does not apply, and should not control, in this case, because it is not a part of the act of incorporation of the Brunswick Bank of Georgia, under

which the liability sought to be enforced arises, and that, inasmuch as this act contains no specific clause of limitation, the general acts of limitation of the state of Maryland, and not those of Georgia, apply. We cannot accede to this proposition in this case. While there is force in the contention, and in some cases it would be doubtless correct, it is not, in our opinion, true here. The statute of limitations of the state of Georgia sought to be applied was not, in its broader sense, the general statute of limitation of the state, as distinguished from a statute contained in the particular enactment; but it was the special statute of limitations of that state, applicable to statutory liabilities, or liabilities arising under acts of incorporation, or by operation of law, in existence at the time and for years previous to the passage of the act of incorporation of the Brunswick Bank, and, therefore, must be considered as forming a part of, as read into, the act incorporating the bank, as much so as if it had been formally incorporated therein, and the stockholders and all persons dealing with this bank are presumed to know of its existence and are bound by its terms."

In that case, as in the case at bar, the limitation was contained in a separate section of the statutes, but, as maintained by us in this case, was the special statute of limitations of the state applicable to liabilities of the character sued upon, and was held to be read into and made a part of the act imposing the liability.

So also in the case of Hobbs vs. National Bank of Commerce of Kansas City, 96 Fed. Rep., 396, and, on rehearing, 101 Fed. Rep., 75. In that case the question before the Circuit Court of Appeals for the Second Circuit was whether the action brought in another state to enforce the statutory liability of a stockholder of a Kansas corporation is governed as to limitation by the statute of Kansas, or of the *lex fori.*

In the Kansas statutes which created the liability of the stockholders no time limit was established within which an action must be brought to enforce it. By the general statute of limitations of Kansas an action upon a liability created by statute for forfeiture or penalty must be brought within three years after the causes of action accrued. This is the Kansas limitation upon a stockholder's liability under Section 32. (See opinion of the court in 96 Fed. Rep., page 397.)

Upon the first hearing of this case the Circuit Court of Appeals simply decided that, *if* the *lex fori* was to control, the three years statute of New York was applicable. Upon the petition for rehearing, 101 Fed. Rep., the court, on page 77, says:

> "It will be recollected that the opinion (referring to the opinion of the court in the same case in 99th Fed. Rep., supra) did not decide that the statute of limitations of Kansas, which was for three years, was not controlling, but, that, if the *lex fori* was to control, the three years statute of New York was applicable."

And his Honor Judge Lacombe then expressed himself most squarely to the effect that the statute of limitations of the state creating the liability is applicable. We quote (page 77):

> "I concur fully in the memorandum filed on denying petition for rehearing. Nevertheless, I am individually of opinion that the statute of limitations applicable to cases of this sort is the statute of limitations of the state whose law-making power has created the liability; or, rather, that the action cannot be maintained in another state when a period of time has elapsed which would defeat the action in the home state, although, possibly, that period may be still further curtailed by the statute of limitations of the state in which the action is brought."

It is to be observed that in that case the statute was much less clearly made a part of the statute creating the liability than was the case in Brunswick Terminal Co. vs. Bank, supra, or in the case at bar.

In Eastwood vs. Kennedy, 44 Md., 563 (see 8 Fed. Rep., 851), it was held that where a statute of the United States for the District of Columbia gave a claim for the recovery of usurious interest, provided suit to recover the same be brought within one year after the payment of such interest, that it would not be competent for a party to recover in Maryland after the lapse of a year, and that the courts of that state were bound to respect and apply the limitations contained in the act. The court says:

> "It would not be competent, for a party to recover here for a claim where none existed under the law of the place where the contract was made; or if it had existed, to resuscitate it, where under the local law, it had ceased to be of any effect."

So in Stern vs. La Compagnie Generale Transatlantique, 110 Fed. Rep., 996, which was an action brought in the District Court for the Southern District of New York to recover for a wrongful death within the waters of New Jersey. The New Jersey statute of 1848 (1 Gen. St., page 1188) gives a right of action for wrongful death, "provided that every such action shall be commenced within 12 calendar months after the death of such deceased person."

The court, Brown district judge, held that such proviso

> "was an express condition of the right of action itself which must be given effect in every forum wherein an action based upon the statute is instituted."

But the court further held that

> "Even if such proviso be held subject to the provision of the general statute of the state that limitation should not run during the time a defendant was not a resident of the state, a plaintiff bringing an admiralty action to enforce the statutory liability in another jurisdiction more than a year after the death sued for cannot invoke such extension, where the action might have been brought in the same court at any time previously, and service on the defendant obtained, and no excuse for the delay is shown."

The court, on page 999, after stating that if the contention of the libellants were sustained the period of limitation would be according to the law of the forum where the suit is brought, says:

> "Hence, there would be no limit at all to the time within which such an action could be brought under the New Jersey statute in any other state except such limitation as the law of the latter state supplied, whether the defendant were a resident of New Jersey or not. Even a citizen or corporation resident in New Jersey, against whom the statutory law had expired in that state, might still be sued in any other state where he or his property might be found, unless the statute of limitations in the latter state prevented; and as to foreign corporations, the limitation of the statute would never attach at all, either in New Jersey or elsewhere. Kirby v. Railroad Co., 14 Fed. Rep., 261; Boardman v. Railway Co., 84 N. Y., 157; Olcott v. Railroad Co., 20 N. Y., 210; 75 Am. Dec., 393; Rathbun v. Railway Co., 50 N. Y., 656."

And on page 1000 the court says further:

> "This construction of the statutory proviso was laid down in Boyd v. Clark (C. C.), 8 Fed., 849, and it was established by the decision of the Supreme Court in The Harrisburg, 119 U. S., 199; 7 Sup. Ct., 140; 30 L. Ed., 358, where the statute under consideration was in substantially the same language as the New Jersey statute, and the court there says:

> "'The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition of the right to sue at all. . . . Time has been made the essence of the right. . . . No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown.'"

And again the court says (page 1000):

> "Nor has any sufficient excuse for the delay been shown in this case more than in The Harrisburg, even if the time-limit condition of the right of action itself could in any case be enlarged. The evidence shows no such excuse; and the fact that this libel was not filed until nearly eight months after the decision in the Middleton case on July 28, 1899, very strongly suggests that there was no intent to sue on this claim until after that decision was rendered."

But the plaintiff claims that he had a vested right to a year in which to sue, and that the provision that if when a cause of action shall accrue against a person he is out of the territory the time of his absence shall not be a part of the time limited for the commencement of the action, gave him a vested right to have his claim exist until the defendant came into the state and stayed there a year.

No case has ever held such a doctrine.

The case of Union Iron Co. vs. Pierce, 4 Biss., 327, in the Circuit Court of the United States for the Seventh Circuit was an action of debt brought by a judgment creditor upon a section of the statute of Indiana providing that upon failure of the corporation to make a report all the officers of the company

" shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof."

Demurrer to the declaration was sustained because the section was repealed after the suit was brought by the passing of an inconsistent amendment thereof without any saving clause.

The court says:

> " It is well settled that the repeal of a penal statute defeats all actions for penalties under such statute pending at the time of the repeal, unless the repealing act, in terms, saves the right to prosecute pending suits."
>
> " In view of these authorities, I think the question resolves itself into this: At the time of the commencement of this action, had the plaintiff such a vested right of recovery upon the facts stated in the declaration, as the legislature has no power to destroy? What, in the legal sense, is a vested right, it is not easy to define. Perhaps as good a definition as can be given is, that it is a fixed, established right not liable to be defeated by any contingency." . . . " If the defendant's liability arose out of a contract, the Constitution would protect the plaintiff's right against all legislation; and so the right would be a vested right. But the act on which the plaintiff's claim is founded is not in the nature of a contract; it is a statute highly penal. A New York statute contained a provision in the very words of the 15th section of the Indiana act for the incorporation of manufacturing and mining companies; and the Court of Appeals of that state held that statute not ' simply a remedial one,' but that the provision was ' highly penal.' "

The court also quotes an Indiana case against a sheriff, saying:

> " In a penalty there can be no vested right until it has been reduced to a judgment. A mere penalty never vests, but remains executory."

The case of Gregory vs. German Bank of Denver, 3 Colo., 332, was an action in assumpsit against a director upon statute making directors, on a failure to make report, " jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made."

The court says:

> " The right of the creditor to proceed against the trustee depended exclusively upon the statute, and when it ceased to exist, all proceedings commenced under it, in the absence of a saving clause in the repealing statute, fell with it. Inchoate rights arising under the statute were swept away. No right can be said to have accrued to creditors under the statute, unless before its repeal such right was carried into judgment. *There is no such thing as a vested interest in an unenforced penalty.*"

In the case of Sea Grove, etc., Association vs. Stockton, 148 Penn. St., 146, it was held that

> " Statutes of limitation form no part of the contract itself; they are simply declarations that if process is used, it must be used within a definite period. They do not affect the obligations of the contract, but merely the remedy, by providing that action shall not be brought after the defined period. Statutes prescribing a particular mode of procedure, on the other hand, so far as applicable, form a part of the contract itself." . . . " It is well settled that when a particular mode of procedure is prescribed, all others are denied or excluded."

It is clear that the plaintiff can claim no vested interest by reason of the provisions of the statute with reference to the absence of the defendant from the state. In fact, the act of 1895 gave him more time by increasing the limitation from one to two years. By the Section 554, to which the question

submitted by the Court of Appeals applies, he was given three years from the time of his discovery of the facts upon which the penalty or forfeiture attached.

But a right of this sort is not a contract. It is solely given by a statute as a punishment of trustees for not performing the duty imposed upon them by statute, and when the statute is repealed the whole liability goes. If the right itself is not a contract, a statute fixing the time within which suit must be brought cannot be an impairment of a contract which does not exist.

In conclusion, we maintain —

1. That under the authorities cited, and by the language of the section itself, the defendant in an action under Section 451 of the Civil Code may avail himself of the limitation contained in Section 554 of the Code of Civil Procedure wherever the suit is brought.

The Purpose and Effect of the Statute, Section 554 of Montana.

This statute (quoted ante, page 7) stands at the end of the *title* which establishes the *general* limitation law for causes of action in Montana.

Among the limitations found in the earlier sections of this title is the general statute of limitations as to " actions upon a statute for a penalty or forfeiture, when the action is given to an individual,"

etc., etc. This is the general statute of Montana, which, but for Section 554, would be the statute applicable to this cause of action. The highest court of Montana has so decided (Bank vs. Remsen, supra, and cases there cited).

But Section 554 is, in terms, made specially applicable to actions " against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law," and it prescribes the time within which action to enforce this special statutory right must be brought.

Section 554 is, therefore, first a statutory statement that the *general statute of limitations* of Montana — the TITLE — does not affect actions against directors and stockholders to recover a penalty or forfeiture imposed, or to enforce a liability created by law; and, second, it is a special limitation of the time within which action to enforce such right created by law (statute) must be brought.

The relation of this Section 554 to the statute creating the right here sought to be enforced is certain and specific — as much so as if both were printed upon the same page of the statute book, or in the same section of statute. Section 554 is, in terms, made specifically to apply to the liability of directors created by law; and as plainly it provides that the general statute of limitations shall not affect actions to enforce such right.

The plaintiff admits that if the limitation was found as a part of the same statute which creates the liability the defense would follow the right to Con-

necticut and defeat it. The distinction, however, which requires the limitation to be found in the same clause or section as the right is without reason or authority. Section 554 was effectually wedded to the statute creating the liability by the legislature of Montana, which created them both, and they cannot be divorced.

Furthermore, the earlier part of Title II contains the statute Section 541, providing that in case of absence from the state the running of the time limited by the general statute of limitations contained in that title should be suspended until the party seeking its protection returned to the state — that is to say, residence in the State of Montana was, by the earlier part of this Title II, made essential to the enjoyment of the protection of the general statute of limitations therein contained.

Not so, however, in case the action is against a director of a corporation to recover a penalty or enforce a liability created by the Montana statute. Section 554 distinctly says " this title does not affect " such actions. In such actions, therefore, it matters not where the residence of the person charged may be, or may have been. Such actions " must be brought within three years." There is no other provision in the Montana statute respecting nonresidence of a party affected by the statute of limitations, and there is therefore no requirement that the defendants here must have resided in Montana for the period of limitation before they could plead or enjoy the benefits of the statute.

This is just and reasonable, and was manifestly intended. It was known that the great majority of directors of Montana corporations have been and were nonresidents of that state, and were likely so to be. It was not desirable that liabilities like those here sought to be enforced should remain forever upon such directors. Such a result is contrary to the policy of the law, which seeks to relieve parties from overhanging and unenforced obligations by limitation, bankruptcy, and otherwise. The defendants here have lived much more than the full limitation time openly exposed to the same action which is now pending. No reason appears, and there is no reason, why the plaintiff could not have commenced his action within the limitation period, unless, perhaps, it had not then occurred to him to speculate upon the enforcement of such a liability.

But even if the statute of Montana, which makes absence from the state an interruption of the running of the limitation period, is found applicable to this action we submit that the absence in such case contemplated is absence from the state of the forum, where the right is sought to be enforced. When the statute creating the plaintiff's right and the defendants' liability is brought to Connecticut, to be there enforced in the courts of that jurisdiction, the statute, in effect, becomes the statute of Connecticut. And not only so, but the other statute, containing the limitation which has been wedded to it, is also brought to Connecticut, and both become in effect and for the purposes of the action Connecticut statutes. And, if so, the absence referred to as inter-

rupting the running of the limitation period is absence from Connecticut.

The only extension of the time for bringing such action, whether in Montana or elsewhere, which is open to be claimed, is suggested by that part of the statute itself which fixes the time when the statutory period begins to run, viz, " within three years *after the discovery* by the aggrieved party *of the facts* upon which the penalty or forfeiture attached, or the liability was created."

But this clause of the statute is not effectual or applicable here. If the defendants were charged with the payment of dividends which rendered the corporation insolvent (as in Bank vs. Remsen), or with some other offense which was not public, which was known only inside of the corporate family or the official board, then these words would possibly operate to defeat the creditor's right by the expiration of the limitation time before the creditor had knowledge of the facts which created the right. Justice and fairness to all parties prompted this provision to meet such cases. But in this case defendants are charged with failure to file a report in a public record office, pursuant to a public statute requiring that such reports be made, in a specified place, at a specified time. It has been repeatedly held that record in the proper record office of an instrument required by law to be recorded is notice to all the world, not only of the instrument itself, but of its record and of its contents. For the same reason and upon the same theory, upon the failure to file a required instrument in the proper

public record office, where it is by law required to be recorded upon a specified day, with penalty for failure so to do, the condition of the record is public notice to the world that the document has not been filed, and no one will be heard to say he did not know of such failure.

Furthermore, upon another principle the same result is reached. On the morning of the 21st day of September the plaintiff, or his assignor, knew that such a report was overdue; that his rights were affected by the presence or absence of such a report. He cannot now be heard to say that he had no knowledge of the failure, that he was not ready to inquire or to be told, or to know whether the required act had been done; he could not extend his right of action by avoiding the means of knowledge which he knew the law had made conveniently accessible expressly that he might have that very knowledge.

2. That under the law and authorities it is clear that Section 554 has the same effect as if it had been written into and made a part of Section 451, and that when suit to enforce a liability under Section 451 is brought in any jurisdiction the limitations of Section 554 go with it.

3. That this court will recognize upon mere suggestion that the questions here involved operate upon the vast and rapidly increasing interstate corporation business of this entire country, and that it is of very great interest and importance that these matters be set at rest by final and authoritative construction.

It would be wrong and unjust that the burden of the penalty or liability imposed by such statutes as are here involved upon the different members of the same board of trustees, because of the same neglect of their corporation to file required reports, should be rendered unequal by the judicial construction placed upon such statutes and their correlated limitation. That one trustee, because he happens to live in a state which has enacted no appropriate statute of limitations, should never be relieved from the burden of the penalty, while another trustee of the same corporation, by reason of a more favorable statute of another state in which he happens to reside, should be compelled to bear the burden of the same liability for only a single year, is a result which offends both justice and reason.

Such a result is wholly unnecessary. The construction claimed by the defendants to be applicable here and to be authorized both by reason and authority wholly avoids the injustice alluded to by bringing to the forum, wherever it may chance to be, together with the statute creating the liability, the statute which, by the sovereignty creating it, was intended as the limit of the right given to the creditor, wherever his domicile might be, and the limitation of the penalty or burden upon all of the trustees in whatever jurisdiction they might be found. Whatever may have been the reason which, in former years, before distances were annihilated and the theory of comity had been developed, suggested as then proper the application of the general statute of the forum as the proper several limitation of action, the marvelous increase and development of interstate

commerce in recent times has now substantially annihilated both distances and the boundaries of state sovereignty, and at the same time has destroyed the reasons upon which the rules as to this subject-matter originated and came into the common law; and it has become necessary for the highest courts of civilized countries, as to this as to other parts of common law, to modify the older existing theories and constructions where the reasons of their existence have ceased, so that the law should keep pace with the conditions which it is its function to regulate.

And particularly, when new constructions have recently enlarged the theory of comity to such an extent that actions upon the statutes creating new rights of action unknown to the common law, including such as are of penal nature and like that here involved, have become enforcible in foreign jurisdictions, both reason and authority direct the application everywhere and in all jurisdictions of that uniform limitation which is specifically provided therefor by the state of origin, and neither reason nor authority suggest the propriety of any other.

Respectfully submitted,

WM. WALDO HYDE,
CHARLES E. PERKINS,
Counsel for Hiram R. Mills, Sole surviving Defendant in Error.

Supreme Court of the United States.

No. 235.—October Term, 1903.

Andrew J. Davis vs. Hiram R. Mills and Clarence C. Frost. } On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

[May 16, 1904.]

This case came here on a certificate of which the following is the material portion:

"The plaintiff is a citizen of Montana and the owner by assignment of three causes of action (for goods sold and on a promissory note) against the Obelisk Mining and Concentrating Company, a Montana corporation. The indebtedness of the company upon these causes of action accrued July 31, 1892, July 1, 1892, and December 12, 1892, respectively. The defendants are and always have been citizens and residents of Connecticut, and at all the times mentioned in the complaint were trustees of the said Obelisk Mining Company. The statutes of Montana provide that within twenty days from the first day of September every such company shall annually file a specified report, and that if it 'shall fail to do so, all the trustees of the company shall be jointly and severally liable for all of the debts of the company then existing, and for all that shall be contracted before such report shall be made.' Section 460 of chapter 25 of the fifth division, Compiled Statutes of Montana, which was in force when the cause of action arose. Re-enacted as section 451 of the Civil Code of Montana, which went into effect July 1, 1895.

"The Obelisk Company failed to file certain of the required reports and the causes of action sued upon here, against the defendants as trustees to recover debts of the company, accrued September 22, 1893, or prior thereto. This action was brought to enforce the joint and several liability of the defendants under the statute on July 30, 1897.

"When the cause of action accrued the Compiled Statutes of Montana contained these sections:

'Sec. 45. 1. In an action for a penalty or forfeiture, when the action is given to an individual, or to an individual and the Territory, except where the statute imposing it prescribes a different limitation; 2, an action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process shall be commenced within one year.'

'Sec. 50. If when the cause of action shall accrue against a person he is out of the Territory, the action may be commenced within the time

herein limited, after his return to the Territory; and if after the cause of action shall have accrued he depart from this Territory, the time of his absence shall not be a part of the time limited for the commencement of the action.'

"Both of those sections were repealed by the Code of Civil Procedure, section 3482, which went into effect July 1, 1895. On the last-named date the Civil Code of Montana went into effect, containing section 451 above cited. The Code of Civil Procedure contains a separate title, numbered II, and containing four chapters (sections 470 to 559), which deals exhaustively with 'the time of commencing actions.' It contains these sections:

'SEC. 515. Within two years:

'1. An action upon a statute for a penalty or forfeiture, "when the action is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation."

'SEC. 541. If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.'

'SEC. 554. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability created (*sic*).'

"Upon the facts above set forth, the question of law concerning which this court desires the instruction of the Supreme Court, for its proper decision, is:

'May a defendant in an action of the kind specified in section 554 of the Code of Civil Procedure of Montana avail of the limitation therein prescribed, when the action is brought against him in the court of another State?'"

Mr. Justice HOLMES delivered the opinion of the Court.

The general theory on which an action is maintained upon a cause which accrued in another jurisdiction is that the liability is an *obligatio*, which, having been attached to the person by the law then having that person within its power, will be treated by other countries as accompanying the person when brought before their courts. But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. *Slater* v. *Mexican National Railroad*, U. S. . It is true that this general proposition is qualified by the fact that the ordinary limita-

tions of actions are treated as laws of procedure and as belonging to the *lex fori*, as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.

If, then, the only question were one of construction and as to liabilities subsequently incurred, it would be a comparatively easy matter to say that section 554 of the Montana Code of Civil Procedure qualifies the liability imposed upon directors by section 451 of the Civil Code, and creates a condition to the corresponding right of action against them, which goes with it into any jurisdiction where the action may be brought. But the question certified raises greater difficulties both as to construction and as to power. We have first to consider whether section 554 purports to qualify, or to impose a condition upon, liabilities already incurred under the earlier act taken up into section 451. In doing so we assume that the word "directors" in the later act means the same as "trustees" in the earlier one. The contrary was not suggested. At the argument we were pressed with section 3455 of the Code of Civil Procedure: "No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions." But the trouble made by this is more seeming than real. The following section deals specifically with limitations, and must be taken to override a merely general precaution against the disturbance of vested rights.

By § 3456: "When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code." The language clearly imports that the limitations in the Code are to apply to existing obligations upon which the previous limitation already had begun to run. The result is that § 554 purports to substitute a three years' limitation for the one year previously in force, assuming that the previous one year limitation applied to this case, as under the decisions it

did. *State Savings Bank* v. *Johnson*, 18 Mont. 440; *Park Bank* v. *Remsen*, 158 U. S. 337, 342. But if § 554 purported to make this substitution, it purported to introduce important changes. It lengthened the time on the one hand, but it took away the exception in case of absence from the State on the other. This last is disputed, but it seems to us a part of the meaning of the words "This title does not affect actions against directors," &c. The section as to absence from the State is a part of the title, and whatever necessary exceptions may be made from the generality of the words quoted, this is not one of them.

A further difference is that, while there might be difficulties in construing the general limitation upon actions for penalties as going to the right, this section is so specific that it hardly can mean anything else. We express no opinion as to the earlier act, but we think that this § 554 so definitely deals with the liability sought to be enforced that upon the principles heretofore established it must be taken to affect its substance so far as it can, although passed at a different time from the statute by which that liability first was created. We do not go beyond the case before us. Different considerations might apply to the ordinary statutes as to stockholders. We express no opinion with regard to that.

We come then to the question of power. It is said that a statute of limitations cannot take away an existing right but only remedies, and therefore that, whatever the effect of § 554 on subsequently accruing liabilities, it cannot bar the plaintiff in this suit. Before considering this it is to be observed in the first place that, so far as the State of Montana was concerned, the only practical difference made by the statute was to take away the allowance for absence from the State while giving over a year for the prosecution of the action within it. The cause of action accrued on September 22, 1893, and the new statute went into effect on July 1, 1895, so that the plaintiffs had at least until September 22, 1896, in which to sue there. As to action within the State, it could not be contended that the change took away constitutional rights. It did not shorten liability unreasonably. *Wheeler* v. *Jackson*, 137 U. S. 245. The only way in which it could be made out that the attempt to take away a remedy outside the State after the same lapse of time was unconstitutional is through the theoretical proposition which we have stated. It is said that remedies outside the State can be affected only by destroying the right, and that no statute of limitations can do that.

It is quite incredible that such an unsubstantial distinction should find a place in constitutional law. Prescription which applies to easement the analogy of the statute of limitations unquestionably vests a title. There is no such thing as a merely possessory easement. A disseisor of a dominant estate may get an easement which already is attached to it, but the easement is attached to the land by title or not at all. Again, as to land the

distinction amounts to nothing, because to deny all remedy, direct or indirect, within the State is practically to deny the right. "The lapse of time limited by such statutes not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder." *Leffingwell* v. *Warren*, 2 Black, 599, 605. So far as we have observed, the cases which have had occasion to deal with the matter generally hold that the title to chattels, even, passes where the statute has run. *Campbell* v. *Holt*, 115 U. S. 620, 623; *Chapin* v. *Freeland*, 142 Mass. 383, 386. Property is protected because such protection answers a demand of human nature, and therefore takes the place of a fight. But that demand is not founded more certainly by creation or discovery than it is by the lapse of time, which gradually shapes the mind to expect and demand the continuance of what it actually and long has enjoyed, even if without right, and dissociates it from a like demand of even a right which long has been denied. *Dunbar* v. *Boston & Providence Railroad*, 181 Mass. 383, 385. Constitutions are intended to preserve practical and substantial rights, not to maintain theories. It is pretty safe to assume that when the law may deprive a man of all the benefits of what once was his, it may deprive him of technical title as well. That it may do so is shown sufficiently by the cases which we have cited and many others.

In the case at bar the question comes up in the most attenuated form. The law is dealing not with tangible property, but with a cause of action of its own creation. The essential feature of that cause of action is that it is one in the jurisdiction which created it; that it is one elsewhere is a more or less accidental incident. If the laws of Montana can set the limitation to the domestic suit, it is the least possible stretch to say that they may set it also to a foreign action, even if to that extent an existing right is cut down. We can see no constitutional obstacle in the way, and we are of opinion that they have purported to do it and have done it.

The question is answered in the affirmative, and it will be so certified.

True copy.

Test:

Clerk Supreme Court, U. S.